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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 193

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

HAL NORWOOD, ATTORNEY GENERAL OF THE STATE OF ARKANSAS; JOE JOINER, PROSECUTING ATTORNEY FOR THE THIRTEENTH CIRCUIT OF ARKANSAS, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

FILED JUNE 9, 1930

(35,115)

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[fol. 4] [Caption omitted]

[fol. 5]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION.

No. 501. Equity

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

HAL NORWOOD, Attorney General of the State of Arkansas; Joe Joiner, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and Chester Holland, Prosecuting Attorney for the Twelfth Circuit of Arkansas, Defendants

Bill of Complaint—Filed October 19, 1929

To the Honorable Judges of the District Court of the United States in and for the Western District of Arkansas:

The plaintiff, Missouri Pacific Railroad Company, a corporation, presents this, its bill of complaint, against the defendants, Hal Norwood, Attorney General of the State of Arkansas, Joe Joiner, Prosecuting Attorney for the Thirteenth Circuit of the State of Arkansas, and Chester Holland, Prosecuting Attorney for the Twelfth Circuit of said State, and, for cause of action, complains and alleges as follows:

I

Parties

The plaintiff is a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office and place of business

in the city of St. Louis, in the State of Missouri, and is a citizen and resident of that state.

The defendant, Hal Norwood, is a citizen of the State of Arkansas, and resides in the city of Little Rock, in said State, and is the duly elected, qualified and acting Attorney-General of the State of Arkansas.

[fol. 6] The defendant, Joe Joiner, is the duly elected, qualified and acting Prosecuting Attorney for the Thirteenth Circuit of the State of Arkansas, and resides in the city of El Dorado, in said State.

The defendant, Chester Holland, is the duly elected, qualified and acting Prosecuting Attorney for the Twelfth Circuit of the State of Arkansas, and resides in the city of Fort Smith, in said State.

By virtue of the laws of Arkansas, it is the duty of said defendants to enforce the provisions of the laws of said State, hereinafter specifically set forth, and to collect, by legal action in the courts of said state, the fines and penalties provided by said laws.

II

Jurisdiction

This court has jurisdiction of this action because it is a suit of a civil nature and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and (1) is a suit between citizens of different states, and (2) arises under the Constitution and laws of the United States, in that plaintiff herein complains of a statute of Arkansas (Laws 1907, No. 116, page 295), prescribing the minimum number of employees to be used in the operation of freight trains and providing a penalty for violating its provisions, and the Act of February 20, 1913, of the State of Arkansas, requiring full switching crews on railroads exceeding 100 miles in length, and prescribing penalties for the violation of said Act,—both of said statutes being hereinafter referred to as the Arkansas Full Switching Crew and the Full Train Crew Laws; and plaintiff seeks relief against said statutes on the ground that both of said statutes are void because they are unlawful attempts to regulate interstate commerce and impose an undue and unreasonable burden thereon, in violation of the Commerce

Clause of the Constitution of the United States; because said statutes are in conflict with the provisions of the Interstate Commerce Act and related Acts, hereinafter more [fol. 7] specifically referred to, by which Congress occupied the same field of legislation; and because said statutes deprive the plaintiff of its property without due process of law and deny to plaintiff the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

III

Plaintiff an Interstate Common Carrier

Plaintiff, at all times herein mentioned, has been, and now is, a common carrier, engaged in the transportation of passengers and property in interstate commerce over its railroad, which extends from the City of St. Louis, in the State of Missouri, westerly and northwesterly through and into the states of Missouri, Kansas, Colorado and Nebraska, east into the State of Illinois, and south and southwest into and through the States of Missouri, Arkansas, Tennessee, Texas, Oklahoma and Louisiana; and petitioner, at all of said times, has been, and now is, subject to the provisions of the Act of Congress approved February 4, 1887, and Acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

The through freight and passenger trains operated by plaintiff between St. Louis, Missouri, Texarkana, Texas, New Orleans, Louisiana, and points in Oklahoma, are operated over plaintiff's main lines of railroad, which pass through the cities of Little Rock, Fort Smith and El Dorado in the State of Arkansas, all of which is shown on the map of plaintiff's line so operated through the State of Arkansas, attached hereto and marked "Exhibit A", and made a part hereof.

Said map shows the divisions and operating districts and principal stations on that portion of plaintiff's main line between St. Louis, Missouri, Texarkana, Texas, the city of New Orleans, in the State of Louisiana, and the different stations reached by plaintiff's line extending into the State of Oklahoma.

Subsequently all of the freight and passenger traffic transported on that part of plaintiff's line between St. Louis, Missouri, New Orleans, Louisiana, Texarkana, Texas, and points in Oklahoma, is interstate traffic; and [fol. 8] the greatest part of said traffic either originates in the State of Missouri or at points east, north and west thereof, and is destined to points south and southwest of the State of Arkansas, all of such traffic being interstate.

At the cities of Little Rock, Texarkana, Van Buren and El Dorado, terminals are located on the plaintiff's line, and the facilities thereat are suitable and convenient for carrying on plaintiff's interstate railroad business, and at all of said terminals, the freight, passenger and switching crews and engines are changed and trains are inspected. Said terminals represents large investments, and most of said terminals were established long before the Arkansas Full Switching Crew and Full Train Crew Laws were enacted.

IV

State Laws Complained of

The Acts of the Legislature of the State of Arkansas, Laws of Arkansas, 1907, No. 116, and the Act of February 20, 1913, (Sections 8583 and 8586, Crawford & Moses Digest, State of Arkansas, 1921) read as follows:

"Section 1. No railroad company or officer of court owning or operating any line or lines of railroad in this State and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, regardless of any modern equipment of automatic couplers and air brakes, except as hereinafter provided.

"Section 2. This act shall not apply to any railroad company or officer of court whose line or lines are less than fifty miles in length, nor to any railroad in this state, regardless of the length of said lines, where said freight train so operated shall consist of less than twenty-five cars, it being the purpose of this act to require all railroads in this state whose line or lines are over fifty miles in length

engaged in hauling a freight train consisting of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, a fireman, a conductor, and three brakemen, but nothing in this act shall be construed so as to prevent any railroad company or officer of court from adding to or increasing its crew beyond the number set out in this act.

"Section 3. Any railroad company or officer of court violating any of the provisions of this act shall be fined for each offense not less than one hundred dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. Provided, the penalties of this act shall not apply during strikes of men in train service of lines involved." Ark. Laws, 1907, No. 116.

[fol. 9] An act of the State of Arkansas, entitled "An Act for the better protection and safety of the public," provides as follows:

"Section 1. That no railroad company or corporation owning or operating any yards or terminals in the cities within this state, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities, shall operate their switch crews with less than one engineer, a fireman, a foreman and three helpers.

"Section 2. It being the purpose of this act to require all railroad companies or corporations who operate any yards or terminals within this state who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this act shall be construed so as to prevent any railroad company or corporation from adding to or increasing their switch crew or crews beyond the number set out in this act.

"Section 3. The provisions of this act shall only apply to cities of the first and second class, and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

"Section 4. Any railroad company or corporation violating the provisions of this act shall be fined for each separate offense not less than fifty dollars, and each crew so illegally operated shall constitute a separate offense."

V

The Extra Switchmen and Extra Brakemen Provided by the Arkansas Laws are Not Used in Standard Railroad Practice

Plaintiff respectfully presents to the court that railroad operating conditions on the lines of the plaintiff railroad in the State of Arkansas and elsewhere, and on railroads throughout the United States, generally differ from operating conditions which existed in 1907 and 1913, when the Arkansas Full Switching Crew and Full Train Crew Laws were passed, in that additions and betterments have been made to road and equipment in the way of improving and making stronger and more secure the rails, roadbeds, and bridges, reducing grades, procuring heavier, stronger and safer engines and cars, and safer power, so that today freight trains and passenger trains containing many more cars than those which could be safely operated when said laws were enacted can now be operated in Arkansas and throughout the United States generally much more safely than smaller trains could then be operated.

[fol. 10] Said additions and betterments, costing many billions of dollars, have been made by the railroad of the United States and by the plaintiff herein for the express purpose of enabling common carriers by railroad to increase their operating efficiency, economy, and safety in the running of longer and heavier freight and passenger trains.

It is the standard practice of the railroads of the United States, and the standard practice of the plaintiff, wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen and extra br-kemen provided by the Arkansas laws. Said trains and said switch engines are commonly, safely and economically operated through the United States and over lines of railroad substantially the same as pl-in-

tiff's lines of railroad extending into and through the State of Arkansas, and except in the State of Arkansas, where said laws require said extra switchmen and extra brakemen, engines, trains and crews are operated, wherever the traffic and circumst-nces make such operation advisable, without such extra switchmen and extra br-kemen. There is no reason, from the standpoint of safety or from any other standpoint, why said extra switchmen and extra brakemen should be employed upon switch engines and freight trains oper-ted into and through the state of Arkansas.

By reason of said expenditures for roadbed and equipment, and by increasing the length of freight and passenger trains and by consolidation of through freight traffic at origin terminals into trains which run through to terminals as far distant as the circumstances will permit without being broken up, the plaintiff and the other railroads into st-tes other than Arkansas, where such extra brakemen and extra switchmen are not required, have been able to effect great economies; but the laws of Arkansas, above set forth, have prevented and now precent the plaintiff from effecting such economies while operating its tr-ins and engines into and through the state of Arkansas.

VI

[fol. 11] General Effect of the Arkansas Laws on Switching Movements and Freight Train Operations

Because of said full switching crew and full train crew laws of the State of Arkansas, the plaintiff is not able to operate its switch engines economically, inasmuch as it is compelled to employ an extra switchman at all terminal points where switch engines are employed, when said extra switchman is wholly unnecessary for the service rendered by the plaintiff.

Because of the law of Arkansas requiring an extra brakeman upon the plaintiff's freight trains, plaintiff is compelled to employ an extra brakeman in addition to the standard crew required in the operation of its through and local freight trains, and said extra brakeman, being wholly unnecessary in the operation of said trains, customarily

leaves said train when the Arkansas state line is reached, and said extra brakeman then customarily deadheads back to the nearest division point on street car, bus or train, and the plaintiff is required to pay said extra brakeman for full time, although very little of said brakeman's time is employed in the actual operation of the plaintiff's trains.

The plaintiff's standard agreement with its employes, entered into between plaintiff and representatives of the Brotherhood of Railroad Trainmen, provides for a standard switching crew, in all states through which the plaintiff operates, of a foreman and two helpers, and the standard agreement entered into between the plaintiff and the said representatives of the Brotherhood of Railroad Trainmen also provides for a standard freight train crew, in through and irregular freight service, of a conductor and two brakemen. And this is the standard crew engaged generally upon all the railroads of the United States in switching and freight train service, and all the different railroads in the United States have similar agreements governing the switching and freight train service with the representatives of the National Brotherhood of Railroad Trainmen, with the exception of the service in states with laws similar to the above laws of the State of Arkansas.

[fol. 12] It is plaintiff's constitutional right, and the Interstate Commerce Act makes it plaintiff's duty, to manage and operate its railroad efficiently and economically, but by reason of said laws of the State of Arkansas, plaintiff is prevented from operating its railroad efficiently and economically.

VII

Savings Which Could be Accomplished by Operation of Switch Engines and Trains Without Extra Switchmen and Brakemen

The savings which would result to the plaintiff from the operation of switch engines and freight trains into and through the State of Arkansas without the employment of such extra and superfluous switchmen and extra brakemen provided by the laws of Arkansas, annually amount to many thousands of dollars, all of which plaintiff is use-

lessly required to expend in order to comply with said extra switchmen and extra brakemen laws.

The amounts hereinafter recited, by which switching movements and direct train expenses, including locomotive maintenance, fuel and other locomotive supplies and engine-house expenses, and wages of trainmen and enginemen, would be reduced if the plaintiff were not compelled to comply with said Full Switching and Extra Train Crew laws of the State of Arkansas, are derived from a careful and exhaustive investigation and study of plaintiff's statistics, accounts, equipment, plant, traffic and operating conditions, by persons competent and skilled in such matters, and plaintiff states that such amounts and savings are true and correct, and, if plaintiff were permitted to operate its switch engines and freight trains into and through the State of Arkansas without being compelled to comply with said extra switchman and extra brakeman laws, a saving in its operating expenses of many hundreds of thousands of dollars annually could be accomplished.

Such operation of switch engines at different terminals in the State of Arkansas would enable the plaintiff to reduce its switching expenses at least $250,000.00, annually, and dispensing with the services of extra brakemen upon its freight trains required by the laws of the State of Arkansas [fol. 13] would also amount in a reduction of direct train expenses in at least the sum of $350,000.00, annually. But for said laws of Arkansas, plaintiff could immediately put into effect a standard system of operation of switch engines and freight trains with standard crews containing one less switchman and one less brakeman than required by said laws of the State of Arkansas, thus effecting a total annual economy in the operation of switch engines and freight trains in the State of Arkansas of $600,000.00.

VIII

Conflict with Commerce Clause and Fourteenth Amendment to the Constitution of the United States

Plaintiff respectfully presents to the court that the Arkansas Full Switching Crew Law and Extra Brakeman Law are void because:

(a) The number of switchmen and the number of brakemen which the plaintiff and the other railroads of the State

of Arkansas shall employ upon their railroads, which are operated into and through the said State of Arkansas and through a number of other states in interstate commerce, from the very nature of the case, are not a lawful subject of regulation by the said State of Arkansas, but is a subject within the exclusive legislative jurisdiction of Congress; and the said statutes of the St-te of Arkansas requiring extra switchmen and extra brakemen upon the interstate railroads operating into and through the said State of Arkansas were and are outside the legislative field of the State of Arkansas as limited by Section 8, Article 1, known as the Commerce Clause of the Constitution of the United States.

(b) Said statutes also impose undue and unreasonable burdens on interstate commerce, in violation of the said Commerce Clause of the Constitution of the United States.

(c) Said statutes are also unreasonable and arbitrary; they bear no real or substantial relation to their ostensible purpose to add to the safety of switching or train operations, and they prevent plaintiff from using, operating and managing its engines and lines of railroad and its railroad facilities situated in the St-te of Arkansas in a reasonable and lawful manner, and prevent plaintiff from [fol. 14] enjoying the benefits -nd advantages which would accrue to plaintiff from standard safe and economical operations, all as hereinabove shown.

(d) Said laws of the State of Arkansas in no way provide whereby the validity of said statutes may be tested except by violating the same and awaiting suits for penalties which would ensue, and at the risk of having to pay such penalties; and said statutes therefore deprive plaintiff of its property and deny to it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

IX

Penalties Assessed Against Plaintiff

Heretofore, the defendants, Joe Joiner, Prosecuting Attorney for the 13th Circuit of the State of Arkansas, and

Chester Holland, Prosecuting Attorney for the 12th Judicial Circuit of said State, acting upon the advice, and under the instructions, of the defendant, Hal Norwood, Attorney-General of the State of Arkansas, have caused to be instituted against plaintiff, in the Justices' Courts of El Dorado, Arkansas, and at Fort Smith, Arkansas, different suits for penalties for failure to employ the extra brakeman required by said laws of Arkansas and many several suits for failure to employ the extra switchman provided by said laws.

Defendant, in its answers to said suits, has set up the invalidity of the laws and pleaded the unconstitutionality thereof, but the said Justices of the Peace, before whom said cases were pending, assessed penalties against the defendant (plaintiff in this cause), for failure to comply with said laws, and unless restrained, the defendants insist upon enforcing said void and unconstitutional acts and threaten to, and will, bring other suits to collect said penalties from the plaintiff (in this cause) upon said void and unconstitutional statutes, in these and other cases.

X

The Statutes of Arkansas are in Conflict with the General Scheme of Federal Regulation

Plaintiff further respectfully shows to the court that the Arkansas statutes, above set forth, are void because they [fol. 15] require the employment of a greater number of switchmen and brakemen in the operating of switch engines and freight trains engaged in interstate commerce than are necessary.

The varying views of state legislatures and state commissions would defeat the general and comprehensive scheme of federal regulation prescribed by (a) the Interstate Commerce Act, as amended by the Transportation Act of 1920, and (b) by the Railroad Labor Act of 1926.

XI

Conflict with Interstate Commerce Act, as Amended

Section 13 of the Act to Regulate Commerce, as amended February 28, 1920, gives the Interstate Commerce Commission complete jurisdiction to prescribe "the rate, fare,

charge, classification, regulation, or practice", which must be adopted and put into effect by interstate carriers, and the Interstate Commerce Commission is given authority by Congress, after hearing, to fix and determine "any such rate, fare, charge, classification, regulation, or practice which may cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, and to prescribe the rate, fare, charge, classification, regulation, or practice thereafter to be observed in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination, * * * the law of any state or the decision or order of any state authority to the contrary notwithstanding."

This section of the Transportation Act, which was not in existence when the constitutionality of the Arkansas Full Switching Law and Extra Brakeman Act were passed upon by the Supreme Court of the United States, clearly shows that Congress, since those decisions, has occupied the field, thus nullifying the state power upon this subject.

[fol. 16] By Section 15 of the Act to Regulate Commerce, as amended February 28, 1920, the Interstate Commerce Commission is given complete authority to determine rates, classifications, regulations, and practices, and the Commission is given authority to prescribe what will be "a just and reasonable rate, fare, — charge thereafter to be observed", and what "individual or joint classification, regulation or practice is or will be just, fair and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist * * * and the carriers shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The Interstate Commerce Commission, by Section 15, paragraph 6, in prescribing the rates and practices to be followed by interstate carriers, is directed by Congress as follows:

"In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give

due consideration, among other things, to the efficiency with which the carriers concerned are operating, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers, and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier to the joint rate, fare, or charge."

Section 15 (a), paragraph 2, further provides as follows:

"In the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole, or as a whole in each of such rate groups, will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structure and equipment, earn an aggregate net annual operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property", etc.

By these sections, the Commission is given authority, not only to fix the rates so as to provide a reasonable return upon the property, but also to regulate the expenditures consistent with proper, efficient operation and economical management. If the Interstate Commerce Commission has authority to prescribe the rates and to regulate the expenditures, then the State of Arkansas, or any [fol. 17] other individual state, cannot uselessly require, under the guise of the police power, an annual expenditure by the carriers of this State of the sum of $1,000,000.00, which is not required by any other of the eight states through which the petitioner operates, for compliance with the so-called Full Crew Laws.

XII

Conflict with Railroad Labor Act

Congress has also legislated upon the complete subject of railway labor by providing for a Board of Mediation

and an Emergency Board, if necessary, to consider, and act upon, all disputes and issued between railroad employees and the common carriers of this country, that they do not settle themselves.

The Railroad Labor Act of 1926, provides that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes. Conferences are provided for "in case of dispute between a carrier and its employes arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions."

Congress, by the Railroad Labor Act, has given the United States Board of Mediation jurisdiction to consider and act upon any and all disputes, and not only to consider reasonable rules and working conditions, but also, when arbitration is had, the decision of the arbitrators, as to proper "working conditions" between railroad employes and common carriers, is binding between both parties.

Plaintiff avers that by said Railroad Labor Act Congress intended to leave the railroad common carriers of the United States and their employes free to handle questions pertaining to rules and working conditions, as in said Railroad Labor Act provided, and intended that if they agreed to arbitrate under said Act any controversies or disputes with respect to rules and working conditions, the judgment of the arbitrators should not be limited in any way other than by Federal statutes, and intended that any judgments or awards entered pursuant to provisions of said act [fol. 18] should not be affected or disturbed in any way by any state statute or any order of any state administrative body theretofore or thereafter passed or entered. The Arkansas extra switchman act and extra brakeman law is therefore void because in conflict and inconsistent with the said United States Railroad Labor Act of 1926.

XIII

Equity Jurisdiction

Plaintiff further avers that it is the duty of defendants to prosecute all violations of said Arkansas Extra Switch-

men Law and the Arkansas Extra Brakemen Act unless restrained from so doing, and as heretofore set out, the State of Arkansas is now contending, by penalty suits instituted against the plaintiff, that plaintiff has violated the law in employing less than the number of switchmen required by the Arkansas Extra Switchmen Act, and that it has also violated the law in employing less than the number of brakemen required by the Arkansas Extra Brakemen Act, and that said state is now seeking to recover fines and penalties, all as provided for by said laws, and unless restrained and enjoined as hereinafter prayed, the defendants will continue to prosecute said actions against the plaintiff and will institute numerous other prosecutions for penalties under said laws.

The damage and injury which plaintiff daily sustains by reason of said statutes as above set forth is great and irreparable, and by reason of the provisions of said laws, the plaintiff cannot safely disregard the same and await prosecutions thereunder for the purpose of testing the validity thereof because of the enormous penalties which might accrue, and furthermore, because of the narrow scope of the evidence and the procedural difficulties which would be encountered in suits at law, the complicated facts of railroad operation and accounting involved in this suit cannot be ascertained and determined in an adequate, proper and orderly manner except in a suit in equity.

[fol. 19]

XIV

Prayer

Wherefore, inasmuch as it is without adequate remedy at law for its protection, plaintiff prays:

(1) That it be ordered, adjudged and decreed by the court that the said Arkansas Extra Switchman Law and the said Arkansas Extra Brakemen Law are null and void for the reasons hereinabove set forth.

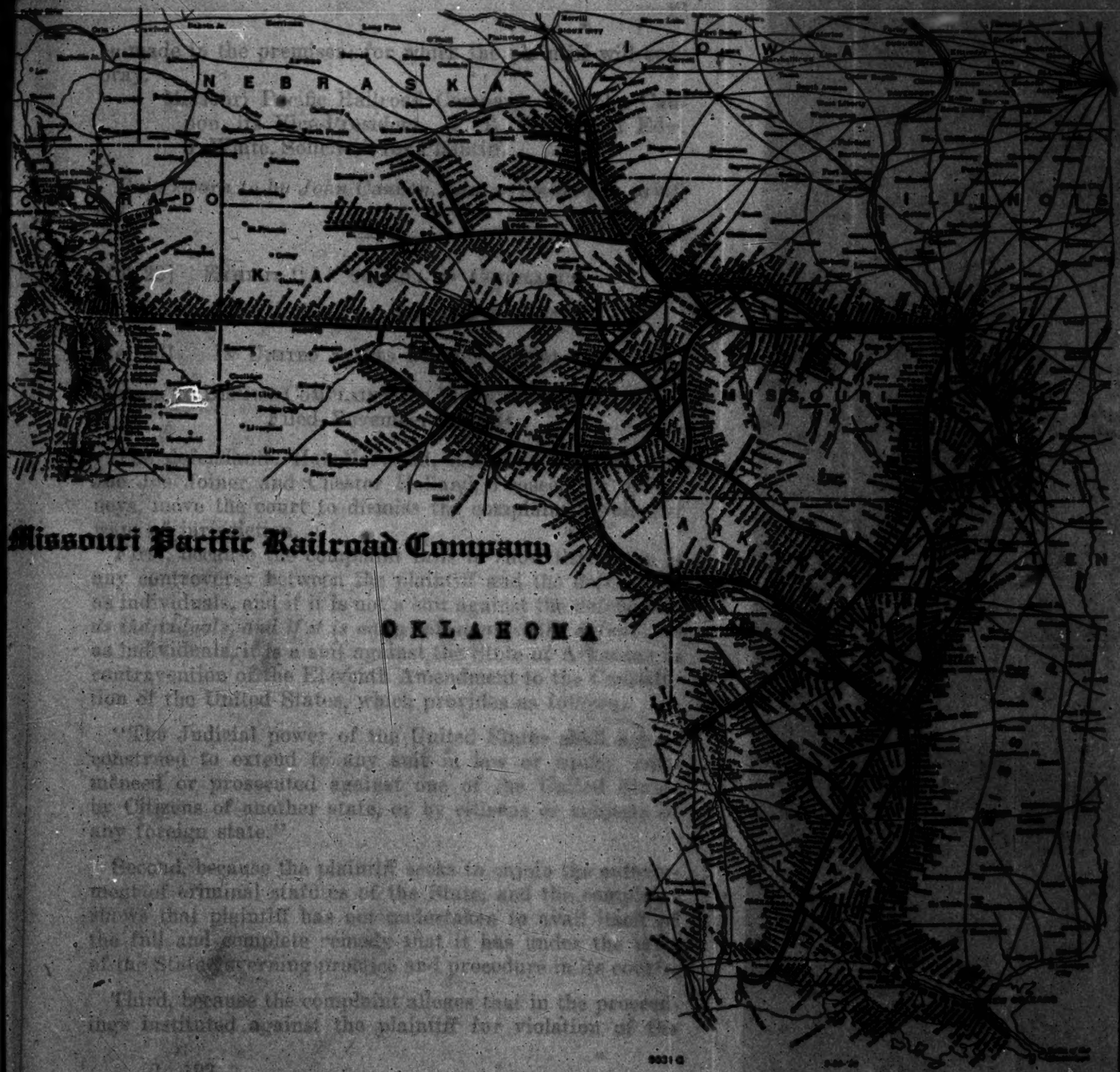
(2) That it be ordered, adjudged and decreed that the defendants, and all persons acting under their direction, be perpetually enjoined from enforcing or attempting to enforce, or from advising, instituting, prosecuting or aiding in any action, suit or proceeding of any kind or character

to recover from or impose upon, or enforce against plaintiff or any of its officers, agents, or employees, or any of them, any penalty or damages for failure or refusal to obey, observe or comply with the provisions of said Arkansas Extra Switchmen Law or said Arkansas Extra Brakemen Law, or from interfering with or attempting to interfere with, or from advising, instituting, prosecuting or aiding in any act, action, suit or proceeding to interfere with, restrain or prevent plaintiff, its officers, agents or employes, or any of them, from operating its switch engines and freight trains within the State of Arkansas without complying with said Extra Switchmen and Extra Brakeman Laws.

(3) That plaintiff have a temporary or interlocutory injunction against defendants restraining them, and all persons acting under their direction, from proceeding to enforce said statutes, and from in any way doing any act or thing which will prevent the operation by plaintiff of its switch engines and freight trains in violation of said Arkansas Full Switching Crew and Extra Brakeman Laws, pending the hearing of this cause, and until the further order of this court.

(4) That the plaintiff may have such other and further or different relief as may be equitable and proper to fully protect its rights in the premises and as to the Court may seem meet and proper.

[fols. 20 & 21] And may it please your Honors to grant unto plaintiff, not only a writ of injunction, conformable to the prayer of this bill, but also that a writ of subpoena of the United States of America issue out of and under the seal of this Honorable Court, directed to the defendants, Hal Norwood, Attorney General of the State of Arkansas, Joe Joiner, Prosecuting Attorney for the 13th Judicial Circuit of the State of Arkansas, and Chester Holland, Prosecuting Attorney for the 12th Judicial Circuit of said State, commanding them, on a day certain, therein named, to be and appear before this Honorable Court, then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises, and to perform and abide by such order and decree as may


NEBRASKA
IOWA
ILLINOIS
KANSAS
OKLAHOMA
Missouri Pacific Railroad Company

be made in the premises; for which the plaintiff will ever pray.

Missouri Pacific Railroad Company, by John Cannon, its Vice-President. T. B. Pryor and Edw. J. White, Solicitors for Plaintiff.

Duly sworn to by John Cannon. Jurat omitted in printing.

[fol. 22] EXHIBIT "A" TO BILL OF COMPLAINT

(Here follows exhibit, side folio 22)

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS COMPLAINT FOR WANT OF JURISDICTION.—Filed November 4, 1929

The defendants, Hal Norwood, Attorney General, and Joe Joe Joiner and Chester Holland, Prosecuting Attorneys, move the court to dismiss the complaint herein for want of jurisdiction.

First, because the complaint fails to show that there is any controversy between the plaintiff and the defendants as individuals, and if it is not a suit against the defendants *as individuals, and if it is not a suit against the defendants* as individuals, it is a suit against the State of Arkansas in contravention of the Eleventh Amendment to the Constitution of the United States, which provides as follows:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by citizens or subjects of any foreign state."

Second, because the plaintiff seeks to enjoin the enforcement of criminal statutes of the State, and the complaint shows that plaintiff has not undertaken to avail itself of the full and complete remedy that it has under the laws of the State governing practice and procedure in its courts.

Third, because the complaint alleges that in the proceedings instituted against the plaintiff for violation of the

laws that it pled their unconstitutionality, but that the Justices of the Peace before whom the case was pending assessed penalties against the plaintiff. Therefore, it appears that the plaintiff has not availed itself of the right of appeal to the Circuit Court and if necessary to the Supreme Court of the State, and then to the Supreme Court of the United States, and plaintiff has no right to invoke the jurisdiction of a federal court for the purpose of annulling the laws of a state because it was not able to convince a justice of the peace that its view of the Constitution was correct.

Fourth, because while the complaint alleges that Con- [fol. 24] gress has occupied the field covered by the statutes sought to be annulled, and section of the Act to regulate commerce, upon which plaintiff relies, and which is copied in the complaint, does not show that Congress has authorized the Interstate Commerce Commission to designate the number of railroad employees that shall constitute train crews or switching crews.

Fifth, because it is not shown or alleged that the Interstate Commerce Commission has adopted any rule or made any order designating the number of employees that shall constitute a train crew or a switching crew.

Sixth, because Congress has not occupied the field covered by the statutes involved, and the State's power has not been nullified upon these subjects.

Seventh, because the complaint shows that the Full Train Crew Act has been in force twenty-two (22) years, and the Full Switching Crew Act sixteen (16) years, and that the plaintiff has during that time successfully operated its railroads, and has spent large sums for additions and betterments. Therefore, it appears from the complaint that the enforcement of the aforesaid laws will not cause plaintiff any immediate and irreparable injury.

Eighth, because the Supreme Court of the United States, in the case of Chicago R. I. & P. R. Co. v. Arkansas, (219 U. S. 453) held that the Full Train Crew law is constitutional, and that it was properly an act of legislation within the scope of the admitted powers reserved to the state, and that its effects on transactions of commerce among the

states is only indirect; incidental and remote, and not such as to burden or impede such commerce.

Ninth, because the Supreme Court of the United States, in the case of St. Louis, I. M. & S. R. Co. v. State of Arkansas, (240 U. S. 518) declared that the Full Switching Crew law is not an unconstitutional interference with Interstate Commerce, and is not repugnant to the Fourteenth Amendment to the Constitution of the United States on the theory that it prevents a contest of its validity by the excess of its penalties.

Tenth, because the questions raised by the complaint [fol. 25] have been finally adjudicated by the Supreme Court of the United States, and issues decided against the contention of the plaintiff.

Wherefore, the premises considered, defendants pray that the complaint herein be dismissed for want of equity.

Hal L. Norwood, Attorney General of the State of Arkansas; Joe Joiner, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and Chester Holland, Prosecuting Attorney for the Twelfth Circuit of Arkansas; W. D. Jackson, Special Counsel, Attorneys for Defendants.

[fol. 26] IN UNITED STATES DISTRICT COURT

In Equity. No. 501

[Title omitted]

AFFIDAVIT OF JAMES H. AMOS—Filed Nov. 18, 1929

STATE OF MISSOURI,
City of St. Louis, ss:

James H. Amos, being first duly sworn, deposes and says that he is, and for the past eight years has been, the claims attorney for the Missouri Pacific Railroad Company, with headquarters at St. Louis, Missouri, and that he makes this affidavit for use in the suit to test the validity and restrain the enforcement of the statutes of Arkansas, commonly known as the Full Crew Switching Law and Extra Brakeman Law, which prohibit, under penalty, the operation of switch engines and freight trains in the State of

Arkansas without the employment of an extra switchman and an extra brakeman on freight trains, and further affiant says:

[fol. 27] Qualifications

That he has had twenty-nine years experience in the claim department of the Missouri Pacific Railroad Company, having been claim agent, district claim agent, assistant claims attorney and claims attorney for said company and its subsidiary lines.

As assistant claims attorney and claims attorney for said road it has been his duty generally to investigate and supervise settlements for personal injuries of passengers, employes and third parties injured as the result of the operation of railroad trains on the lines of said company.

Affiant's duties also required him to make various economic investigations and studies of the causes and means of eliminating accidents and personal injuries to passengers and employes, and he is personally familiar with the effect of the operation of the Arkansas Full Crew Switching Law and the Extra Brakeman Law of said state as affecting the hazards of railway service, and whether such acts tend to minimize or increase the casualties in the operation of railroads of said state.

For the purpose of ascertaining whether there is any reason or basis for the claim sometimes made that freight trains and yard-switching crews should, for safety reasons, be manned by three brakemen and three switchmen, affiant, after giving the matter careful study, came to the conclusion that the correctness or incorrectness of that claim could best be demonstrated by comparing the number of accidents resulting in personal injuries and deaths to employes in freight-train service for the year 1928 in the States of Arkansas and Missouri.

[fol. 28] During the year 1928 your affiant was employed as claims attorney for the Missouri Pacific Railroad Company, and in that capacity it was his duty to keep certain records of personal injuries and death of trainmen and enginemen occurring in Arkansas and Missouri in the service of the Missouri Pacific Railroad Company, and that he did keep such records, showing all injuries and deaths (reportable to the Interstate Commerce Commission) of employes arising in freight train and in yard service, and that

he has compiled from his said records the facts and figures in the aggregate, showing by classes the injuries and deaths of all such employes, for each of the states, as appears next following:

Table No. I

Reportable Personal Injuries—Freight-Train Service—Year 1928

Class	State of Arkansas, number of injured or killed	State of Missouri, number of injured or killed
Enginemen—		
Killed	1	0
Injured	16	23
Trainmen—		
Killed	3	1
Injured	91	67
Total	111	91
Freight train miles	4,280,202	4,232,011
Injuries per freight-train mile	.000026	.000021

[fol. 29]

Table No. II

Reportable Personal Injuries—Yard Service Employes—Year 1928

Class	State of Arkansas, number of injured or killed	State of Missouri, number of injured or killed
Enginemen—		
Killed	0	1
Injured	10	21
Yardmen—		
Killed	2	2
Injured	64	84
Total	76	108
Number of cars handled in yards during year	4,832,376	6,607,616
Injuries per car handled	.000016	.000016

The number of injuries per freight-train mile is greater in Arkansas than in Missouri by .0005 of one per cent, and

the aggregate freight-train mile for the period is greater in Arkansas than in Missouri by 1.11 per cent.

In yard service for this period there were 36.8 per cent more cars handled in Missouri than in Arkansas.

Economic comparisons appear in the tables next following, showing the aggregate amounts paid for injuries and deaths set out in tables No. I and No. II.

[fol. 30] Table No. III

Amount Paid for Injuries and Deaths Occurring During the Year 1928 to Freight Train Service Employes

Class	State of Arkansas, amount paid	State of Missouri, amount paid
Enginemen—		
Deaths	$9,003.50	
Injuries	8,095.00	$17,629.00
Yardmen—		
Deaths	12,267.00	7,000.00
Injuries	25,578.50	37,890.30
Total	$54,944.00	$62,519.30
Freight train miles	4,280,202	4,232,011
Amount paid per train mile	.013	.015

Table No. IV

Amount Paid for Injuries and Deaths Occurring During the Year 1928 to Yard Service Employes

Class	State of Arkansas, amount paid	State of Missouri, amount paid
Enginemen—		
Deaths		$10,000.00
Injuries	$4,490.00	1,576.50
Yardmen—		
Deaths	9,052.00	11,774.50
Injuries	48,476.50	15,999.13
Total	$62,018.50	$39,350.13
Number of cars handled in yards during year	4,832,376	6,607,616
Amount paid per car handled	.013	.006

[fol. 31] The amount paid for each train mile in Arkansas in 1928 was $0.0128, and the amount paid in Missouri was $0.0148, it being more in Missouri by $0.002 for each train mile.

In yard service there was paid $0.01283 for each car handled in Arkansas during 1928, and in Missouri $0.005955 for each car; the rate being 57.6 per cent greater in Arkansas than in Missouri.

As a further means of camparison a statement has been compiled of accidents resulting in deaths and personal injuries as reported to the Interstate Commerce Commission covering the period from 1924 to 1928, inclusive, by states, as shown by table No. V.

[fol. 32]

Table No. V

Injuries Reported to the I. C. C. in Train and Yard Service Accidents

State	Year	Employes: Road trainmen: Passgr. service No.	Employes: Road trainmen: Freight service No.	Employes: Yardmen No.	Employes: Others No.	Passengers: Passgr. trains	Passengers: Frt. trains	Outsiders: Passgr. trains	Outsiders: Frt. trains	Tresspassers: Passgr. trains	Tresspassers: Frt. trains	Totals
	1924	29	161	135	41	215	8	49	62	26	63	789
	1925	17	171	169	58	80	9	40	45	12	49	650
Ark.	1926	25	142	116	38	89	25	47	60	15	43	600
	1927	14	142	107	41	46	20	43	43	25	63	533
	1928	7	111	76	25	59	13	47	34	14	47	433
												3005
	1924	25	145	123	48	111	9	39	41	18	53	612
	1925	20	126	138	42	50	9	42	49	20	49	545
Mo.	1926	28	139	117	45	33	9	28	63	17	52	531
	1927	22	148	118	36	34	4	40	32	20	47	501
	1928	16	91	108	52	20	3	15	41	17	40	403
												2592

[fol. 33]

	1924	16	104	58	19	22	7	20	43	7	44	340
	1925	9	107	51	18	33	0	24	18	2	30	292
Kans.	1926	8	92	52	26	21	9	15	22	3	14	262
	1927	8	76	32	13	38	3	17	25	5	29	246
	1928	9	69	31	17	22	3	57	20	1	17	246
												1386
	1924	2	27	53	9	10	5	0	1	1	6	114
	1925	0	18	57	3	3	1	6	7	1	7	103
Ill.	1926	1	27	70	5	1	1	1	6	0	9	121
	1927	0	36	29	0	1	4	1	3	0	6	80
	1928	3	22	25	4	1	0	4	0	1	6	66
												484
	1924	2	66	34	19	15	3	8	11	3	12	173
	1925	6	109	39	11	1	0	7	9	1	17	200
La.	1926	2	57	30	6	3	1	9	13	3	15	139
	1927	7	50	35	10	2	1	9	13	4	11	142
	1928	8	21	26	6	2	0	13	8	4	11	99
												753

Table No. V—Continued

State	Year	Employes: Road trainmen: Passgr. service No.	Employes: Road trainmen: Freight service No.	Employes: Yardmen No.	Employes: Others No.	Passengers: Passgr. trains	Passengers: Frt. trains	Outsiders: Passgr. trains	Outsiders: Frt. trains	Tresspassers: Passgr. trains	Tresspassers: Frt. trains	Totals
[fol. 34]	1924	2	9	26	1	1	0	7	2	1	11	60
	1925	3	14	15	3	7	1	1	10	1	6	61
Nebr.	1926	1	7	10	2	3	0	2	3	0	6	34
	1927	1	8	3	1	2	0	3	6	2	2	28
	1928	1	3	9	2	2	0	4	6	1	2	30
												213
	1924	1	8	5	1	0	0	0	0	0	0	15
	1925	1	6	4	2	0	0	0	0	0	1	14
Colo.	1926	1	7	2	2	0	0	1	1	0	0	14
	1927	0	7	5	1	0	0	2	2	0	0	17
	1928	0	5	0	0	1	0	1	2	0	1	10
												70
	1924	2	13	0	0	2	1	0	4	4	7	33
	1925	0	17	0	0	2	0	1	0	0	4	24
Okla.	1926	1	17	1	2	1	0	2	7	2	5	38
	1927	0	17	0	3	1	1	1	5	3	3	34
	1928	0	2	0	6	10	1	0	3	1	3	26
												155

[fol. 35] Table No. VI, as deduced from table No. V, shows decrease in injuries and deaths to employes arising out of train and yard service accidents in other states, and per cent of decrease, as compared with Arkansas, for five years; and table No. 7 shows decreases in all classes of injuries and deaths arising out of train and yard service accidents in other states, and per cent of decrease, as compared with Arkansas, for five years.

Table No. VI

Decrease in Number of Injuries and Deaths to Employes in Other States as Compared with Arkansas, 1924 to 1928, Inclusive, and per cent.

State	Decrease in number of injuries	Per cent
Missouri	38	.02
Kansas	810	.49
Illinois	1234	.75
Louisiana	1081	.66
Nebraska	1504	.92
Colorado	1567	.96
Oklahoma	1544	.95

[fol. 36] Table No. VII

Decrease in Number of Injuries and Deaths to All Classes of Persons in Other States as Compared with Arkansas, 1924 to 1928, Inclusive, and per Cent.

State	Decrease in number of injuries	Per cent
Missouri	413	.13
Kansas	1619	.53
Illinois	2521	.83
Louisiana	2242	.74
Nebraska	2792	.92
Colorado	2935	.97
Oklahoma	2840	.94

Taking all accidents arising out of train and yard service, including injuries sustained by employes in train and yard service, passengers, outsiders and trespassers, by states, for five years, from 1924 to 1928, inclusive, table No. VIII has been compiled as a basis of comparison of injuries reported to the Interstate Commerce Commission based on the per cent of injuries to the 100,000 train miles and per 100,000 car miles.

[fol. 37]

Table No. VIII

Injuries to All Classes of Persons Reported to the I. C. C. in Train and Yard Service Accidents and per Cent per 100,000 Train Miles and 100,000 Car Miles

State	Year	Number of injuries	Total train-miles	Per cent per 100,000 train-miles	Total car-miles	Per cent per 100,000 car-miles
Arkansas	1924	789	8,294,127	.09513	195,594,570	.00403
	1925	650	8,711,594	.07461	226,578,796	.00287
	1926	600	8,790,025	.06826	234,507,204	.00256
	1927	533	7,543,410	.07066	200,456,923	.00266
	1928	433	8,567,831	.05054	233,310,558	.00186
Total		3,005	41,906,987	.07176	1,090,448,051	.00276
Missouri	1924	612	7,465,681	.08198	173,146,498	.00353
	1925	545	7,722,637	.07057	188,894,354	.00289
	1926	531	7,849,943	.06764	205,382,656	.00259
	1927	501	7,913,092	.06331	212,272,751	.00236
	1928	403	7,642,294	.05273	225,125,314	.00179
Total		2,592	38,593,647	.06716	1,004,821,573	.00258

[fol. 38]

	1924	340	6,813,852	.04990	149,530,763	.00227
	1925	292	6,574,092	.04442	154,734,619	00189
Kansas	1926	262	6,692,712	.03915	168,452,468	00156
	1927	246	6,787,641	.03624	172,856,257	.00142
	1928	246	6,881,959	.03575	185,640,789	.00133
Total		1,386	33,750,256	.04107	831,214,896	.00167
	1924	114	1,005,894	.11332	51,321,066	.00222
	1925	103	974,909	.10564	55,979,392	.00184
Illinois	1926	121	1,128,777	.10720	67,764,974	00179
	1927	80	944,709	08468	56,500,748	00142
	1928	66	1,150,585	.05736	66,377,426	00099
Total		484	5,204,874	09299	297,943,606	.00162
	1924	173	2,102,972	08226	54,135,279	.00320
	1925	200	2,790,950	.07166	78,757,454	00254
Louisiana	1926	139	2,651,117	05243	72,829,965	.00191
	1927	142	2,178,909	.06517	57,914,741	.00245
	1928	99	2,165,913	.04571	59,395,111	.00167
Total		753	11,889,861	.06333	323,032,550	00233

Table No. VIII—Continued

State	Year	Number of injuries	Total train-miles	Per cent per 100,000 train-miles	Total car-miles	Per cent per 100,000 car-miles
[fol. 39]						
	1924	60	964,754	.06219	19,552,798	.00307
	1925	61	955,710	.06383	20,616,043	.00296
Nebraska	1926	34	958,660	.03547	22,045,606	.00154
	1927	28	1,027,261	.02726	21,429,794	.00131
	1928	30	1,020,124	.02941	20,123,684	.00149
Total		213	4,926,509	.04324	103,767,925	.00205
	1924	15	572,858	.02618	13,425,813	.00112
	1925	14	614,173	.02280	15,716,775	.00089
Colorado	1926	14	653,612	.02142	18,437,872	.00076
	1927	17	648,336	.02622	18,689,664	.00091
	1928	10	653,777	.01530	20,439,436	.00049
Total		70	3,142,756	.02227	86,709,560	.00081
	1924	33	875,843	.03768	25,633,293	.00129
	1925	24	888,673	.02701	27,019,154	.00089
Oklahoma	1926	38	927,787	.04096	28,900,489	.00131
	1927	34	886,491	.03835	26,460,393	.00128
	1928	26	904,755	.02874	29,236,923	.00089
Total		155	4,483,549	.03457	137,250,252	.00113

[fol. 40] A study of this table and also of table No. V shows a gradual decrease or lessening of injuries in all states during the five years mentioned, and there is a decrease in accidents in other states as compared with Arkansas, as shown by this table; in the State of Illinois there is an increase of approximately twenty-five per cent (25%) in accidents to the 100,000 train miles as compared with Arkansas, but it will be noted that the accidents in Illinois as per 100,000 car miles are approximately forty-one per cent (41%) less than in Arkansas. The increase in Illinois over Arkansas, as compared with the 100,000 train miles, is accounted for by the fact that in Dupo, Illinois, there is a very large terminal with two "humps," and the switch engines in this yard are manned by what are termed "hump riders"; that is to say, with one switch engine there are from fifteen to twenty-five switchmen, or "hump riders," while in Arkansas there are only three with each engine.

The figures as contained in the above tables show a general decrease in accidents reportable to the Interstate Commerce Commission during the five years mentioned, which is in line with the figures of the Interstate Commerce Commission, which show 85,570 reportable cases of injuries to passengers, employes and others resulting from steam railroad accidents for 1928 in the United States. This is a reduction of 19,247 accidents, or a decrease of eighteen per cent (18%) over 1927, and a reduction of 86,142—more than fifty per cent (50%)—over 1923.

[fol. 41] Conclusion

Based on his experience and the investigations he has made, affiant is of opinion that the operation in the State of Arkansas of switch engines and freight trains containing more than the standard crew does not minimize the casualties to employes in freight train and yard service, but, on the whole, the operation of switch engines and freight trains containing the standard crews would permit greatly increased efficiency and economy, and that such operation would be safer than present operation requirements under Arkansas laws; that the Extra Switchman and Extra Brakeman provisions of said Arkansas laws do not promote, but militate against efficiency, economy and safety, and are unreasonable and arbitrary limitations; and that compliance

therewith greatly increases the number of employes and the operating expenses over what are required for the safe, efficient and economical operation of the railroad of said company in the State of Arkansas.

James H. Amos.

Subscribed and sworn to before me this 21st day of October, 1929. W. Jenkins, Notary Public. My commission expires February 28, 1931. (Seal)

[fol. 42] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEWIS WARRENTON BALDWIN—Filed Nov. 18, 1929

STATE OF MISSOURI,
City of St. Louis, ss:

Lewis Warrington Baldwin, being first duly sworn, deposes and says that he is, and for the past six years has been, the President of the Missouri Pacific Railroad Company, with headquarters at St. Louis, Missouri, and that he makes this affidavit for use in the suit filed in the District Court of the United States for the District of Arkansas by the Missouri Pacific Railroad Company, to test the validity, and restrain the enforcement, of the Statutes of the State of Arkansas, commonly known as the Arkansas Extra Switchman Law and the Arkansas Extra Brakeman Act, which prohibit, under penalty, the operation of switch engines in the State of Arkansas without the extra switchman provided for in said law and the operation of freight trains without the employment of the extra brakeman required by said law; and affiant further says:

Qualifications

That he graduated from the Lehigh University in 1896, taking the degree of civil engineer; that he entered the service of the Illinois Central Railroad in 1896, and was, successively, Superintendent, Engineer Maintenance of Way, and General Superintendent of the Illinois Central and Yazoo & Mississippi Valley Railroad from 1906 to 1915;

that he then became General Manager and, later, Vice President and General Manager of the Central of Georgia Railway, and was located at Savannah, Georgia, from 1915 to [fol. 43] 1918; that he was Assistant Regional Director of the United States Railroad Administration, Southern Region, at Atlanta, Georgia, from February to June, 1918; that he held similar position in the Allegheny Region at Philadelphia, Pennsylvania, 1918 and 1919, and was Regional Director of the Allegheny Region from October 1, 1919, to February 29, 1920; that, in March, 1920, he returned to service with the Illinois Central Railroad, and was Vice President in Charge of the Operating Department, from March 1, 1920, to March 31, 1923, when he was elected President of the Missouri Pacific Railroad Company, which duties he assumed April 1, 1923.

Improvements and Betterments Added Since 1923

That since the year 1923, when affiant assumed the duties as President of the Missouri Pacific Railroad Company, said Company has expended annually large sums of money in making improvements, additions and betterments to its road bed, tracks and equipment, and also in the acquisition of new, heavier and stronger equipment and in the improvement of old equipment, all of which expenditures were for the safety of the public and its employes and for the purpose of enabling said Company to increase its freight and passenger traffic by affording prompt, reliable and dependable service to its patrons, and to avail itself of the economies that would accrue from efficiency in operation as a result of better and more improved facilities.

That during the years from 1923 to 1928, inclusive, the aggregate expenditures for these purposes was approxi- [fol. 44] mately $116,917,297.09, including the following items and amounts:

New Lines and Extensions, including Second Main Tracks	$17,679,854.45
Additional Ballast	3,860,888.77
Rails, Ties and Other Track Material	10,987,253.38
Strengthening and Replacing Bridges, Trestles, and Culverts	5,162,796.39

Assessments for Public Improvements	1,439,589.79
Changes in Grades and Alignment	6,937,595.74
Signals and Interlockers	3,637,081.32
New Locomotives and Improvements to Existing Locomotives	17,042,972.30
New Freight Cars and Improvements to Existing Cars	22,599,342.61
New Passenger Cars and Improvements to Existing Cars	5,400,241.06

That said expenditures in road and equipment were made progressively from year to year, as, when and where traffic conditions made such expenditures desirable, and the average annual amount so expended during the said six-year period was $19,486,216.18. That the new, heavier and improved locomotives and cars provided can be used and are available for use on all main lines wherever needed.

Increased Operating Efficiencies Since 1923

That in the year 1922, the average mileage per freight car per day upon the Missouri Pacific Railroad was 21.76 miles and that the average mileage per freight car per day upon said Road in the year 1928 was 40.63 miles, or an increase of 86.7 per cent. That the average train load per freight train mile (as represented as net tons carried one [fol. 45] mile) was increased from 614 tons in 1923 to 704 tons in 1928, or 14.7 per cent.

That a great many trains carry in excess of 25 cars and 704 net tons, the average being the result of the operation of lines in sparsely settled territory and the operation of light traffic branch lines in sections on which regular train service must necessarily be maintained regardless of the quantity of traffic available for such train service.

That the average tractive power of locomotives (passenger, freight and others) and the average freight car capacity upon the Missouri Pacific Railroad in 1923 and 1928 were as follows:

	1923	1928	Increase
Average Tractive Power of Locomotive (Pounds)	35,883	40,677	4,794
Average Freight Car Capacity (Tons)	37.49	40.74	3.25

That by reason of heavier train loading and greater efficiency in the operation of locomotives, the fuel consumption per 1,000 gross ton miles by said Company's locomotives in freight service was reduced from 180 pounds in 1923 to 141 pounds in 1928, or 21.7%.

That the aforesaid expenditures for improvements in road bed and equipment and the resulting economies in operation that flowed from the larger train loads enabled said Company to substantially offset the larger increases in wages and the increased cost of fuel and other material and supplies encountered in the last six years, and continue to maintain its railroad property in an efficient condition and render adequate service to the public without any increase in transportation rates.

[fol. 46] That in order to operate the Railroad with due efficiency and economy as required under Section 15a of the Interstate Commerce Act, it is necessary to load trains moving in the direction of traffic to the practical maximum capacity of the cars and locomotives whenever and wherever there is sufficient traffic for this purpose and the character of the lading and the necessity for accelerated movement will permit, and also to curtail operating expenses in every available manner.

That any statutory or other legislative acts which necessitate the expenditure of such amounts annually, as are required to comply with the Arkansas Extra Switchman Act and the Arkansas Extra Brakeman Law, necessarily have the effect of reducing general operating efficiency and to correspondingly increase the cost of supplying transportation service to the public, all of which is inconsistent with efficient and economical operation.

Number of Switchmen and Brakemen Employed Outside of Arkansas

That it is the regular practice of the Missouri Pacific Railroad Company and the standard practice of other Railroads in the United States to operate switch engines and freight trains in trains as long or longer in many localities outside the State of Arkansas, without the extra switchman and the extra brakeman required under the Arkansas Laws.

That the employment of extra switchmen and extra brakemen upon the switching and train crews in the State of Arkansas entails an enormous annual expenditure, which is entirely useless, and the employment of such extra employes is not in keeping with proper railroad efficiency and [fol. 47] economy, and that trains of equal length are operated upon other lines and equally frequent switch movements occur at such important terminals as St. Louis and Kansas City, without the employment of the extra switchman or the extra brakeman required under said Arkansas Laws.

Conclusion

Based upon experience and investigation, affiant is of the opinion that the maintenance of the extra switchmen and extra brakemen required by the Arkansas Laws, do not make for safety of operations and that the operation of switch engines and freight trains in Arkansas, as in other states through which the Missouri Pacific Railroad Company operates, would result both in increased efficiency and economy if such extra *brakemen* and extra brakemen were dispensed with, and that such operations would be as safe as present operations under the said Arkansas Extra Switchman and Extra Brakeman Laws.

Affiant is further of the opinion that the Arkansas Extra Switchman and Extra Brakeman Laws do not promote, but militate against, efficiency, economy and safety, and are unreasonable and arbitrary legislative provisions, and compliance therewith greatly increases the number of employes and the operating expenses over those reasonably required for the safe, efficient and economical operation of railroads in the State of Arkansas.

L. W. Baldwin.

Subscribed and sworn to, before me, this 13th day of November, 1929. Geo. W. Collins, Notary Public. My commission expires June 27th, 1933.

[fol. 48] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. E. BROOKS—Filed Nov. 18, 1929

STATE OF ARKANSAS,
County of Pulaski, ss:

W. E. Brooks, being first duly sworn, deposes and says: I am general superintendent of the Missouri Pacific Railroad Company and, as such, have supervision of said railroad company. My headquarters are at the City of Little Rock, State of Arkansas. I make this affidavit for use in suit filed in the District Court of the United States by the Missouri Pacific Railroad Company to test the validity, and restrain the enforcement, of the statutes of the State of Arkansas commonly known as the "Arkansas Extra Switchman" and the "Arkansas Extra Brakeman" laws, which prohibit, under penalty, the operation of switch engines in cities of the first and second class, and of freight trains of twenty-five cars or more, within the State of Arkansas, without the employment of the extra switchman and the extra brakeman required by said laws.

Qualifications

I am, and have been since January 10, 1919, general superintendent of the Southern district, comprising Missouri Pacific lines in Oklahoma, Arkansas and Northeast Louisiana, of the Missouri Pacific Railroad Company.

I have been employed by said company about forty years and during the course of such employment have held official positions as follows:

Train dispatcher,
Chief train dispatcher,
Trainmaster,
[fol. 49] Chief clerk to assistant general manager,
Superintendent, and
General superintendent.

Prior to my coming to the Missouri Pacific Railroad Company I was employed by the Atchison, Topeka & Santa Fe Railway Company as telegrapher and train dispatcher, and, with the Chesapeake & Ohio Railroad, as telegrapher.

Full Brakeman Law Now Impractical

The Arkansas Full Crew Law requires the third brakeman on trains of twenty-five cars or more, including the caboose, and its operation results in carrying the third brakeman on all through freight crews operating wholly within the state, there being no severe grade lines upon which through freight trains are now operated that reduces the train below the twenty-five-car limit.

Under the present condition of the roadbed and equipment of the Missouri Pacific lines in the State of Arkansas the provision of the Arkansas law regarding trains of twenty-five cars is practically obsolete. Freight trains of twenty-five cars or less are seldom, if ever, operated in the State of Arkansas in the direction of traffic, and the net result of the law is to force the third brakeman on all through freight trains operated wholly or partially within that state.

On trains operating partly in Arkansas and partly in an adjoining state, the third brakeman on the crew is confined to the territory lying between the first station in the adjoining state and the first freight terminal within the boundaries of Arkansas, and sets up a situation where two [fol. 50] men are used to perform all the duties required on the train outside of Arkansas for which three men are required, under the law, within the State of Arkansas. Under this law it frequently occurs that a train of twenty-five or more cars leaving Van Buren, northbound, with three brakemen, fills out to full tonnage for the locomotive to forty-five or more cars at Greenwood Junction, Oklahoma, at which point the third brakeman is dropped.

The Federal Safety Appliance Act requires power brakes on all cars and precludes, as a matter of safety, the use of hand brakes in stopping trains, and places the control of speed and stopping, as well as starting, the train entirely within the hands of the enginemen.

Freight trains, other than local trains, which do switching at stations, do not ordinarily carry freight cars for points between the terminals of the runs. There are, therefore, no routine duties assigned to the third brakeman by the rules and regulations of the company.

Duties of Third Brakeman

Brakemen are not required to keep any records for the use of the company; they report for duty fifteen to twenty

minutes in advance of the time set for departure of their train; see that a supply of hand lanterns, fusees, torpedoes for signaling purposes, as well as prepared journal-box packing and tools to handle it, have been placed upon the caboose by another employe, who is regularly assigned to that duty; place proper train markers on the rear car of the train, and see that air-brake hose are coupled up and working. This latter requirement is accomplished by a glance at an air-pressure gauge placed on the wall of the [fol. 51] caboose immediately in front of the brakeman's seat in the cupola and also visible from the floor of the car. If, for any reason, their train stops on the main line, they are required to go to a point sufficiently far to the rear of their train to stop any following train, where they will remain until called in by whistle signals from their own engine, or the following train has arrived and stopped. The brakeman on the forward end of the train is required to open switches to let his train into the siding when necessary to get out of the way of more important trains, and this switch is closed by the rear brakeman when the caboose has cleared it. During the time a train may be standing, and not requiring flag protection, they are required to look over their train to see that there is nothing detrimental to safe operation.

On all lines, both in and out of the State of Arkansas, where heavy less-than-carload freight and station switching occurs, the third brakeman is employed to advance the work and movement of trains assigned to that service; trainmen in through freight service are not required to brass cars set out by other crews; but, in the case of perishable freight, they are expected to use every effort to avoid setting out cars short of destination or of a repair point where car men are employed; and, when a car is so set out, short of destination or terminal of their run, an employe from another department of the service is sent to repair it.

There are no duties performed by three brakemen within the State of Arkansas which are not performed by two brakemen on other portions of the line.

[fol. 52] Grades on Arkansas Lines

The Missouri Pacific heavy traffic lines in the State of Arkansas, for the greater part, are located on the lowlands

adjacent to the Mississippi River, where the topography of the country is such that there are long stretches of level track, free from curvature; the grades, if any, are short and light. It is possible to pass signals over greater distances than prevail on other parts of the system. The main lines, where the traffic is more dense, are laid with heavy rail, fully tied and ballasted, and the liability for derailments and accidents is at a minimum; and the more important lines are equipped with automatic signal protection and long sections of double track.

It would appear that the framers of the law were more concerned in securing employment for additional men than in throwing safeguards around the operation of freight trains within the State of Arkansas. In 1907, at the time this law was placed on the statute books, the safety appliance laws and the regulations of the Interstate Commerce Commission had already imposed upon the railroads the requirement for air brakes, automatic couplers and other safety appliances which rendered the twenty-five-car requirement unnecessary and obsolete. This car-limit requirement would have been drastic and unreasonable in the day of hand brakes and link-and-pin couplers on lines such as exist in the State of Arkansas.

Effect of Extra Switchman Law

The law requiring the third switchman in cities of the first and second class within the State of Arkansas does not establish any specific duty which the third man or any other member of the crew is to perform. Practically all [fol. 53] street crossings, carrying heavy vehicular or pedestrian traffic, are protected either manually or by some form of advance notice, such as crossing flagmen, crossing gates manually operated, or signal indications operated electrically.

There are no duties required or permitting switchmen to go between cars for the purpose of coupling or uncoupling in switching service. Additional help may be necessary in certain yards on account of difficulty in performing switching service due to excessive curvature in track layout, rendering it impracticable to transmit signals; under such circumstances, terminal superintendents and yardmasters have authority to use additional yardmen as the circumstances warrant.

Conclusion

The operation of the Arkansas Full Train Crew and Switching Crew Laws, requiring the railroads to employ extra and additional men above the actual requirements for safe and efficient operation, results in an enormous annual expense which cannot be justified. The operating officers are men of experience and their chief concern is safe, prompt and economical operation of the property. Without exception, they believe that these laws are uneconomical, inefficient, burdensome and indefensible from any standpoint.

W. E. Brooks.

Subscribed and sworn to before me this 23rd day of October, A. D. 1929. My commission expires September 26, 1931. Ross A. Lee, Notary Public. (Seal.)

[fol. 54] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN CANNON—Filed Nov. 18, 1929

STATE OF MISSOURI,
City of St. Louis, ss:

John Cannon, being first duly sworn, deposes and says: I am Vice-President and General Manager of the Missouri Pacific Railroad Company and, as such, have supervision over the operating department of said Railroad Company; my headquarters are at the City of St. Louis, State of Missouri, and I make this affidavit for use in suit filed in the District Court of the United States by the Missouri Pacific Railroad Company to test the validity, and restrain the enforcement, of the statutes of the State of Arkansas, commonly known as the Arkansas Extra Switchman and the Arkansas Extra Brakeman Laws, which prohibit, under penalty, the operation of switch engines and freight trains in the State of Arkansas without the employment of the extra switchman and extra brakeman required by said laws.

Qualifications

I am, and have been since September 1, 1926, Vice-President and General Manager of the Missouri Pacific Rail-

road Company. I have been employed by said company for about twenty-five years and, during the course of such employment, have held official positions as follows:

Superintendent,
General Superintendent,
General Superintendent of Transportation,
Assistant General Manager,
General Manager, and
Vice-President and General Manager,

[fol. 55] Prior to my coming to the Missouri Pacific Railroad Company, I was connected with the Illinois Central Railroad Company in various capacities, part of which time I was employed as a trainman and as a Trainmaster, and had opportunity to observe the operations of trains, the work of trainmen, not only as a supervisor, but also in the actual performance of their duties.

Obsolete Operating Practices

Three brakemen were used on a great many divisions of the Missouri Pacific Railroad during the early days of railroading, when freight cars were equipped with link and pin couplers and trains were controlled by hand brakes. Freight engines and freight cars then in service were not equipped with air brakes, and, when necessary to make stops or reduce speed, account descending grade, passing through stations and towns, the control of the train was almost entirely entrusted to the train crew. The following, quoted from the rules for the government of employes of the operating department, effective November 1, 1901, illustrates some of the more important duties formerly required of trainmen:

"They must know that there are a sufficient number of good brakes in each train to insure safety, and that the rear car of every train has an efficient brake.

"On arriving at a terminal station or where there is an inspector or foreman of repairs, conductors must report to him, in writing, any defects in the condition of the cars or any imperfect action of the brakes during the trip."

[fol. 56] "In the ordinary performance of their duties upon the road, conductors must collect and preserve all brasses, broken drawheads, brake rods, car doors, and other

broken material which must be taken to terminal stations and delivered to the car foreman or other person designated to receive."

"The proper place for a freight train conductor, while his train is in motion, under ordinary circumstances, is in the cupola of his caboose. If the caboose should not be provided with a cupola, he will then maintain such other position, either on the top or inside, as will give him a full view of his train, and enable him to see that his men properly perform their duties, and to know that his brakemen go out promptly when necessary to flag. He must also keep a sharp lookout, especially when rounding curves. He must require all his brakemen to be on top of the train at least one mile before arriving at and while passing all stations and stopping places, descending and ascending grades, or at any point or time when extra precaution is necessary to insure safety."

In 1906, the management of the Missouri Pacific Railroad reduced the men in the crews of through freight trains, on all districts where an additional trainman had been employed, to an engineer, fireman, conductor and two brakemen, as the work of the crews had been so materially lessened, due to the introduction of modern appliances, such as air brakes and automatic couplers, that there was no longer any necessity for a third brakeman on through freight trains.

[fol. 57] Modern Improvements in Train Operation

The work of trainmen has undergone a radical change in the past twenty-five or thirty years, principally brought about by improvements that have been made in equipment and the better maintenance and inspection of cars and locomotives. The installation of automatic couplers, air brakes, improved draft gear, steel underframes and construction, the closer inspection of trucks, wheels, journals and bearings have greatly reduced the delays to trains, the work of the crews and almost entirely eliminated brassing cars and packing boxes by roadmen.

In fact, the duties of trainmen have been so materially reduced that the work of brakemen today consists, for the most part, in looking out for signals, lining up switches at

meeting points, protecting their trains by flagging, and looking over the running gears, brake and draft rigging of trains at points where stops are made. The enormous increase in the amount of perishable freight handled, the necessity for prompt and accelerated movement have reduced the number of stops of through freight trains to those of meeting trains, taking coal and water. Automatic signals, heavier rail, fully ballasted track have reduced the hazard of accidents in freight service to a minimum.

Present Service of Train Crews

Freight trainmen usually report for duty at terminals about fifteen minutes prior to the time set for the departure of the trains; their trains are inspected before leaving terminals by car-men, who couple up the air and make the [fol. 58] required tests after the engine has been put on the train. At all important terminals, the cars contained in the train have been listed by the yard clerks, the waybills sorted out and handed the conductor, together with his wheel report, practically all of which work at one time devolved upon the train crew. Even the supplies for the crews are placed on the cabooses, and the trainmen are only required to make requisitions for such supplies as are needed and to know that they have been furnished before starting out on their runs. The head brakeman usually couples the engine onto the train, the rear brakeman puts out his markers and, at night, lights the caboose lamps and lanterns, the conductor gets the orders and the train is ready to go.

The record of hot boxes packed by road men for the month of June, 1929, shows 1.25 hot boxes per 100,000 car miles; on the basis of an average train haul of 125 miles and an average of 50 cars per train, which is in excess of the train load for June, which was 46.74 cars, would mean one hot box for each thirteen trips. The average for June, 1929, was higher than ordinary, it being .99 in May, and .93 in April, 1929.

Train partings have been almost entirely eliminated by the use of automatic couplers and improved draft rigging. During June, 1929, out of a total of 20,668 freight trains run, there were only 112 trains reported during that month as breaking in two, or one train out of every 185 run, so

that a crew working every day would average a train to break in two once in each six months. Trainmen have been almost entirely relieved of the work incident to trains breaking in two, or chaining cars together.

[fol. 59] Ruling Grades in Arkansas

Ruling grades on main lines in the State of Arkansas are among the lightest on the system. The following main-line districts, wholly or in part within the State of Arkansas, have ruling grades as follows:

		Ruling grade		Maximum curvature
		N. & E.	S. & W.	
Poplar Bluff to North Little Rock	180 miles	0.45	0.57	3°-03′
North Little Rock to Texarkana	146 "	0.80	1.11	3°-02′
Van Buren to Little Rock	154 "	0.60	0.63	5°-50′
Paragould to Lexa	105 "	0.35	1.10	5°-10′
Lexa to McGehee	82 "	0.20	0.24	7°-30′
Little Rock to McGehee	101 "	0.40	0.50	3°-00′
McGehee to Monroe	94 "	0.20	0.30	3°-07′
McGehee to Ferriday	149 "	0.25	0.25	4°-00′
Gurdon to Collinston	134 "	1.12	0.99	8°-24′
Bald Knob to Memphis	90 "	1.12	1.10	3°-50′

These are some of the main lines, wholly or in part within the State of Arkansas, over which heavy traffic is handled and where, under the law, we are compelled to use the third brakeman for as much of the distance as lies within the State of Arkansas. There is more straight track, less obstruction of view, lighter grades and less liability for accident or emergency service than on any corresponding territory on the system.

Third Brakeman Unnecessary.

That there is no necessity for a third brakeman on through freight trains, handling twenty-five cars or more, in the State of Arkansas is most clearly demonstrated by [fol. 60] the fact that it is the general practice to take off the additional trainman at the first stop after passing the State Line, and to pick him up just before entering the State. On one district, we are compelled by the Arkansas State Law to use a third brakeman, Northbound, for a dis-

tance of six miles only, after which, the engine, hauling the same number of cars, proceeds to the terminal, 160 miles further, with two brakemen. Southbound trains on this same district run 160 miles with two brakemen and take on the third brakeman six miles out of Van Buren.

Trainmen have been relieved of riding on top of trains; the head brakeman rides in the engine cab or in a specially constructed cabin provided for his use on the engine tender; the flagman rides in the caboose on the rear of the train, and the third brakeman generally rides with the conductor and the flagman in the caboose. There is no work in connection with the movement of through freight trains that cannot ordinarily be handled by a conductor and two brakemen. All of the duties incident to through freight operation are being satisfactorily performed by a conductor and two brakemen on other parts of the system where trains of equal or greater length are handled, where the traffic is as heavy, train interference as great or greater, grades steeper, curvature and other conditions less favorable.

The track mileage, freight train mileage, freight car miles and the average number of freight cars per train mile, Missouri Pacific System, for the five-year period, 1924 to 1928, inclusive, is shown in statement attached for all of the States in which the Missouri Pacific Railroad operates.

[fol. 61] The average number of cars handled in freight trains in Arkansas very closely conforms with the average on the system; it is about the same in Arkansas as in Missouri and Oklahoma, and very much less than in the State of Illinois.

Unnecessary Expense of Third Brakeman

The expense to the Missouri Pacific Railroad for the third brakeman on freight trains in the State of Arkansas averages $350,000.00 per annum. This is an unnecessary expense. The third brakeman performs no useful service and, on trains where a part of the trip is within and a part without the State of Arkansas, he usually rides to the first stopping place beyond the State Line, where he leaves the train and remains until he can ride back to the terminal on the first available train, his pay continuing until he reaches the terminal. The greater part of the time for which he is

paid, he is not riding on the train, but lying around stations, waiting to get back to the point where he started to work.

The employment of unnecessary men by any common carrier is not only a useless waste of money, but also is so inefficient and inexcusable as to have a very harmful effect on the service in general and on the morale of the entire organization. The use of an unnecessary brakeman in our freight service on a small percentage of the trains run, covering an equally small percentage of the mileage, is indefensible from any angle, causes unrest and discontent among the employes on other parts of the system, and can only be regarded as providing, by means of an Act of the Legislature, employment for additional men, which the or- [fol. 62] ganizations were unable to accomplish by negotiations with the officers of the railroad, who had full knowledge of the necessities and requirements of the service and the number of men that were required to perform the duties necessary for the safe, prompt and efficient handling of trains.

Unnecessary Expense of Third Switchman

The Arkansas Law of 1913, providing for the use of the third helper on all switch crews, where switching, pushing or transferring of cars are made across public crossings within the city limits of cities of the first or second class, has resulted in an unnecessary and continuing expense to this company of $250,000.00 annually. The agreement with our yardmen provides that:

"A yard crew shall consist of not less than a foreman and two helpers,"

which applies on all other parts of the system, except within the State of Arkansas, where the third helper is employed in compliance with the law. The object of the act is, ostensibly, that the third helper shall afford protection at public crossings. The law, however, does not require the carrier to use this additional helper to flag prior to moving over the crossings or to give warning to highway travelers or to the drivers of vehicles. The additional switchman is required by this Arkansas statute on all switch engines whose duties require them to work over public crossings, even though the public crossings in the

territory where the switch engine works are protected by watchmen or gates, or whether the crossing may be used [fol. 63] but once in each day's work by the yard engine. The addition of the third helper to the standard switch crew does not guarantee any greater protection to the public than is already afforded under the rules and practices on all properly managed railroads. The book of transportation rules of the Missouri Pacific Railroad Company carries the following rule, promulgated by the American Railway Association, and which is a standard regulation in effect on practically all railroads in the United States, and which is rigidly enforced in all yards, this rule reading as follows:

"When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the leading car, and, when shifting over public crossings at grade, not protected by a watchman or gates, a member of the crew must protect the crossing."

In the year 1928, 20,826,900 cars were handled by switch engines in the various yards and terminals on the Missouri Pacific Railroad. Of this number, 4,832,376, or about 23 per cent, were handled by switch crews in the State of Arkansas. Experience shows that our public crossings are just as well protected in the other seven states through which we operate as they are in the State of Arkansas, and that highway crossing accidents are no less frequent on account of the employment of the third helper.

Arkansas is the only State that requires the use of a third helper on switch engines. The standard practice is for a switch crew to consist of an engineer, fireman, a foreman and two helpers. There are, of course, exceptions to [fol. 64] this standard rule in nearly all the large terminals where additional helpers are used on certain crews on account of conditions of grade and curvature, switching in and about places where the view is obstructed and signals cannot be readily passed. When such conditions justify the use of additional helpers, terminal superintendents and yardmasters have authority to use them.

Conclusion

State legislation on matters of this kind is unnecessary, as the judgment of the managing officers can and should be

[fol. 65]

Exhibit to Affidavit of John Cannon

Track Mileage

Year ending	Missouri	Kansas	Nebraska	Colorado	Illinois	Arkansas	Louisiana	Oklahoma
12-31-24	1,632.43	2,256.69	357.58	152.11	240.54	1,806.94	751.85	161.83
12-31-25	1,630.39	2,235.54	357.58	152.11	240.54	1,807.71	751.92	161.83
12-31-26	1,630.39	2,235.67	357.58	152.05	240.54	1,807.87	761.16	161.83
12-31-27	1,630.34	2,235.81	357.58	152.04	246.05	1,810.48	766.98	161.83
12-31-28	1,630.39	2,236.03	357.58	152.04	292.21	1,829.65	785.06	161.83

Freight-train Miles

12-31-24	3,868.496	3,975,008	564,943	304,538	810,695	4,197,809	1,370,050	508,420
12-31-25	3,964,543	3,905,549	563,365	352,216	803,775	4,449,839	1,915,447	522,422
12-31-26	3,988,352	4,101,732	561,348	412,729	962,182	4,486,887	1,633,897	560,789
12-31-27	4,266,781	4,115,975	551,720	390,007	795,347	4,051,469	1,306,235	544,160
12-31-28	4,232,011	4,382,564	529,856	427,929	981,920	4,280,202	1,216,924	599,963

Freight-car Miles

12-31-24	149,957,492	136,128,834	17,825,480	11,955,118	50,815,275	169,777,111	50,752,739	23,507,267
12-31-25	163,913,140	141,660,022	18,788,593	14,305,797	55,497,349	199,147,071	74,441,385	24,929,798
12-31-26	179,062,742	155,632,823	20,108,363	16,935,981	67,351,234	205,947,243	67,388,174	26,748,585
12-31-27	185,642,979	160,296,616	19,150,883	17,232,621	56,084,805	190,135,953	53,337,225	24,632,666
12-31-28	199,347,101	173,795,107	17,929,632	19,104,770	65,989,589	203,073,501	54,532,747	27,348,012

Average Number of Freight Cars per Train Mile

12-31-24	38.76	34.25	31.55	39.26	62.68	40.44	37.04	46.23
12-31-25	41.34	36.27	33.35	40.60	69.04	44.74	38.87	47.72
12-31-26	44.90	37.94	35.82	41.03	70.00	45.90	41.24	47.70
12-31-27	43.51	38.95	34.71	44.19	70.52	46.93	40.83	45.27
12-31-28	47.09	39.66	33.84	44.64	67.20	47.44	44.81	45.58

Missouri Pacific R. R. Co., St. Louis, Missouri, September 14, 1929.

Exhibit to Affidavit of John Cannon

Track Mileage

	Missouri	Kansas	Nebraska	Colorado	Illinois	Arkansas	Louisiana	Oklahoma	Total system
.....	1,632.43	2,256.69	357.58	152.11	240.54	1,806.94	751.85	161.83	7,359.97
.....	1,630.39	2,235.54	357.58	152.11	240.54	1,807.71	751.92	161.83	7,337.62
.....	1,630.39	2,235.67	357.58	152.05	240.54	1,807.87	761.16	161.83	7,347.09
.....	1,630.34	2,235.81	357.58	152.04	246.05	1,810.48	766.98	161.83	7,361.11
.....	1,630.39	2,236.03	357.58	152.04	292.21	1,829.65	785.06	161.83	7,444.79

Freight-train Miles

.....	3,868.496	3,975,008	564,943	304,538	810,695	4,197,809	1,370,050	508,420	15,599,959
.....	3,964,543	3,905,549	563,365	352,216	803,775	4,449,839	1,915,447	522,422	16,477,156
.....	3,988,352	4,101,732	561,348	412,729	962,182	4,486,887	1,633,897	560,789	16,707,916
.....	4,266,781	4,115,975	551,720	390,007	795,347	4,051,469	1,306,235	544,160	16,021,694
.....	4,232,011	4,382,564	529,856	427,929	981,920	4,280,202	1,216,924	599,963	16,651,369

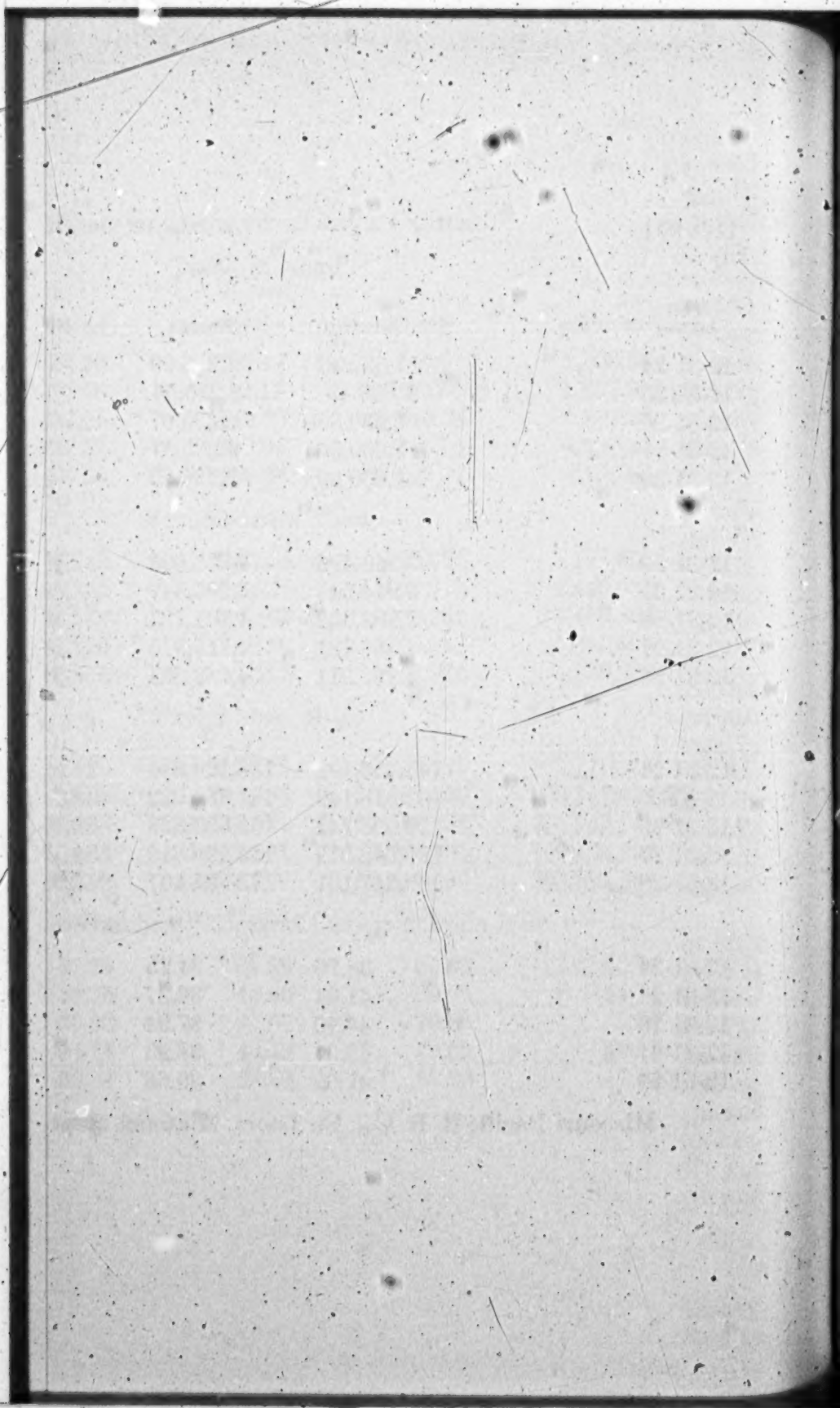
Freight-car Miles

.....	149,957,492	136,128,834	17,825,480	11,955,118	50,815,275	169,777,111	50,752,739	23,507,267	610,719,316
.....	163,913,140	141,660,022	18,788,593	14,305,797	55,497,349	199,147,071	74,441,385	24,929,798	692,683,155
.....	179,062,742	155,632,823	20,108,363	16,935,981	67,351,234	205,947,243	67,388,174	26,748,585	739,175,145
.....	185,642,979	160,296,616	19,150,883	17,232,621	56,084,805	190,135,953	53,337,225	24,632,666	706,513,748
.....	199,347,101	173,795,107	17,929,632	19,104,770	65,989,589	203,073,501	54,532,747	27,348,012	761,120,459

Average Number of Freight Cars per Train Mile

.....	38.76	34.25	31.55	39.26	62.68	40.44	37.04	46.23	39.15
.....	41.34	36.27	33.35	40.60	69.04	44.74	38.87	47.72	42.04
.....	44.90	37.94	35.82	41.03	70.00	45.90	41.24	47.70	44.24
.....	43.51	38.95	34.71	44.19	70.52	46.93	40.83	45.27	44.10
.....	47.09	39.66	33.84	44.64	67.20	47.44	44.81	45.58	45.71

i Pacific R. R. Co., St. Louis, Missouri, September 14, 1929.



depended upon to provide enough men to handle trains and conduct the work of switching cars, making up and breaking trains in a safe and efficient manner. These laws have the effect of placing additional men on trains and switching crews without regard to the necessity for their services, and require the railroad companies to carry this expense without any corresponding benefit.

John Cannon.

Subscribed and sworn to this 19th day of October, A. D. 1929. My commission expires June 27th, 1933. Geo. W. Collins, Notary Public within and for the City of St. Louis, State of Missouri. (Seal.)

(Here follows exhibit to affidavit of John Cannon, side folio 65)

[fol. 66] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF M. T. FULTON—Filed Nov. 18, 1929

STATE OF MISSOURI,
County of Jackson, ss:

1. M. T. Fulton, being first duly sworn, deposes and says that he is, and has been for the past eight years, Supervisor of Safety for The Kansas City Southern Railway System, with headquarters at Kansas City, Missouri; that he makes this affidavit for use in a suit filed in the District Court of the United States for the Western District of Arkansas, by the Missouri Pacific Railroad Company, to test the validity and restrain the enforcement of the statutes of the State of Arkansas, commonly known as the Arkansas Extra Switchmen and the Arkansas Extra Brakemen Laws, which prohibit, under penalty, the operation of switch engines without the extra switchmen provided for in the said law and the operation of freight trains without the employment of the extra brakemen required by said law.

2. This affiant further states that he has been in the service of The Kansas City Southern Railway Company since 1906; that since 1920 he has been Supervisor of Safety; that during the four years prior to 1920 he was Chief Clerk to General Superintendent of Transportation; that during the past twelve years he has made a special study of the causes of accidents resulting in injuries to employes, passengers and others occurring upon The Kansas City Southern System, and has made various investigations with a view to minimizing the causes of such accidents and personal injuries.

[fol. 67] 3. This affiant has prepared a statement of injuries to passengers, employes, trespassers and others in all of the accidents reportable to the Interstate Commerce Commission during the eight years ending December 31, 1928, which statement is attached hereto and marked "Exhibit A"; that said statement shows the accidents in which persons were injured, resulting in a loss of time of over three days, in the case of employes, and the loss of more than one day as to others; that as to those accidents which do not come within the specified classification set out in

said Exhibit A, and which are totaled as miscellaneous accidents, this affiant has attached a detailed statement showing the nature of each individual accident—that is to say, the cause thereof.

4. Affiant further states that in his opinion neither the extra switchmen nor the extra brakemen, as the case may be, employed on The Kansas City Southern Railway System as a result of said Statutes of Arkansas, is essential or necessary to safe operation; that in the opinion of this affiant, as a result of first-hand observations of men at work on the ground, that the great majority of injuries to train and other employes are due to disregard of safe practices by the employe injured; that after due consideration of all the accidents on said Railway System during the year 1928, as to any such accidents as occurred on any division where an extra brakeman was not employed, or in switching districts where an extra switchman was not employed, it is affiant's opinion that there was not a single instance where the injury resulted from the absence of an additional brake-[fol. 68] man or switchman, as the case might be; and affiant further states that such has been his experience and the result of his investigation in the previous seven years.

5. Affiant further states that in his opinion the addition of such extra brakemen and such extra switchmen, as required by the Statutes of Arkansas, increases the number of employes who are subject to the usual risks inherent in train operations.

M. T. Fulton.

Subscribed and sworn to before me this 19th day of October, 1929. My commission expires April 10, 1932. R. R. Barr, Notary Public. (Seal.)

[fol. 69]

EXHIBIT "A" TO AFFIDAVIT OF M. T. FULTON

Injuries to Passengers, Kansas City Southern System Lines

(Compiled from Reports to Interstate Commerce Commission)

	Year 1928	Year 1927	Year 1926	Year 1925	Year 1924	Year 1923	Year 1922	Year 1921
All Causes	11	21	38	5	13	18	13	66

[fol. 70] Injuries to Employes in Train and Train Service Accidents, Kansas City Southern System Lines

(Compiled from Reports to Interstate Commerce Commission)

Proximate Cause	Year 1928	Year 1927	Year 1926	Year 1925	Year 1924	Year 1923	Year 1922	Year 1921
1. Collision	0	0	7	2	6	4	6	9
2. Derailments	1	9	4	4	0	2	15	4
3. Getting on or off	3	13	8	11	7	5	14	22
4. Falling from engines or cars	6	12	10	12	15	18	28	11
5. Coupling or uncoupling	4	7	4	6	6	11	6	6
6. Rough handling	1	0	4	3	1	3	1	5
7. Break-in-two	1	0	0	0	3	0	3	4
8. Handling switches	2	0	3	4	0	7	4	2
9. Shaking grates	0	3	1	0	1	5	3	3
10. Struck by engine or car	1	2	2	2	2	6	4	2
11. Struck by side or overhead obstruction	3	2	2	4	3	2	4	6
12. Miscellaneous accidents — Detailed statements attached	18	38	34	20	42	51	75	53
Total	40	86	79	68	86	114	163	127

The Kansas City Southern Ry. Co., Office of Supervisor of Safety, Kansas City, Missouri, September 30, 1929.

[fol. 71] Injuries to Trespassers and Licensees. Kansas City Southern System Lines

(Compiled from Reports to Interstate Commerce Commission)

Proximate Cause	Year 1928	Year 1927	Year 1926	Year 1925	Year 1924	Year 1923	Year 1922	Year 1921
1. Getting on or off	13	2	6	7	7	11	5	7
2. Falling from	3	2	6	5	5	5	6	9
3. Struck or run over	19	20	22	21	25	23	32	28
4. Derailment	1	3	0	0	0	2	10	5
5. Collision	0	0	7	0	0	3	0	3
6. Auto struck by passenger train	11	3	4	3	13	6	5	11
7. Auto struck by freight train	3	2	6	2	4	2	1	2
8. Auto striking passenger train	5	0	1	0	0	0	0	0
9. Auto striking freight train	3	4	4	1	0	1	0	3
10. Auto struck by switch movement	2	4	6	0	2	6	8	6
11. Auto striking switch movement	1	3	7	0	3	4	7	1
Total	61	43	69	39	59	63	74	75

The Kansas City Southern Ry. Co., Office of Supervisor of Safety, Kansas City, Missouri, September 30, 1929.

M. T. Fulton.

[fol. 72] Detailed Statement of Accidents Classified as Miscellaneous, Item 12, on Statement of Injuries to Employes in Train and Train Service Accidents on the Kansas City Southern System

Year 1928

1. Struck by blasted rock, Kansas City.
2. Finger mashed in the door, Kansas City.
3. Stepped on obstruction in Port Arthur yard.
4. Engine moved itself, cutting off finger, Leesville.
5. Foreign particle in eye conductor, Leesville.
6. Sand in eye switchman, Port Arthur.
7. Handling reverse lever strained back engineer, Pittsburg.
8. Riding in auxiliary cab seat gave way brakeman, First District.
9. Scalded by squirt hose fireman, Heavener.
10. Coal chute cable slipped, Lanagon.
11. Piece of journal jack struck eye brakeman, First District.
12. Engineer Kansas City struck in eye by wire in cab.
13. Switchman Pittsburg releasing brake, wrenched back.
14. Slack ran up in 52-car train took fireman off balance, First District.
15. Cinder in eye fireman, First District.
16. Engineer scalded by blowoff cock opened by fireman, First District.
17. Switchman, Kansas Ctiy, caught finger between rail and derail.
18. Engine watchman, Neosho, pulling truck, foot slipped, sprained back.

Year 1927

1. Conductor Ira Davis, Leesville, knocked down on car when struck engine.

[fol. 73]

2. Car stake fell on hand of switchman, Beaumont, Texas.
3. Running to catch caboose, fell in ditch, brakeman, Beaumont, Texas.

4. Car Inspector Watts slipped and fell walking alongside of train.
5. Engineer slipped and fell in deck of standing engine, Shreveport.
6. Fireman, Port Arthur, burned by explosion of gas in fire box.
7. Engineer at Hume got cinder in eye and it became infected.
8. Brakeman at Leesville got sand in eye.
9. Engineer at Shreveport got sand in eye.
10. Drop seat in cab of engine at Kansas City fell with engineer.
11. Helper (second) fireman strained back shoveling coal, First District.
12. Switchman, Port Arthur, sand in eye.
13. Engineer at Shreveport got sand in eye.
14. Brakeman at Lewis, runboard to depot fell on foot.
15. Engineer and First and Second Fireman and head Brakeman at Windsor, Oklahoma (4 persons) in locomotive boiler explosion, one killed, one fatally injured and two injured.
16. Squirt hose left open scalded second fireman at Pittsburg.
17. Porter strained back while loading mail at Beaumont.
18. Engineer at Oretta got foreign object in eye.
19. Fireman at Port Arthur got sand in eye.
20. Brakeman struck in abdomen by station runboard, Oil City.
21. Engineer at De Queen got sand in eye.
22. Switchman at Port Arthur got sand in eye.
23. Fireman at Marble City caught finger between fire door and clinker hook.

[fol. 74]

24. Fire- at Howe, coal stuck to shovel, sprained shoulder.
25. Switchman, Pittsburg, setting brake and chain broke.
26. Fireman at Anacoco got sand in eye.
27. Switchman at Kansas City, walking along track stumbled over grain door.
28. Engine foreman, Kansas City, stepped in hole sprained ankle.
29. Switchman, Port Arthur, got sand in eye.

30. Fireman, rock flew, broke goggles, glass in eye, Bon Ami.
31. Train Auditor struck by licensee on platform, Texarkana.
32. Engineer at Leesville oiling around slipped off side rod.
33. Brakeman at Amsterdam running beside car stepped on coal.
34. Brakeman, Shreveport, got foreign particle in eye.
35. Engine foreman riding footboard struck by auto.

Year 1926

1. Brakeman at Florien broke hand closing box-car door.
2. Engineer at Leesville burned by explosion of gas in fire box.
3. Fireman at Fort Worth fell in gangway on clinker hook.
4. Conductor at Leesville, letting off brake wheel, struck hand.
5. Engineer at Leesville got foreign particle in eye.
6. Special Officer on train near De Queen shot by trespasser.
7. Engine foreman, Port Arthur, got foreign particle in eye.
8. Engineer at Ft. Smith struck by reverse lever.
9. Fireman at Kansas City fell in deck as engine rounded curve.

[fol. 75]

10. Switchman at Shreveport setting brake struck by club.
11. Brakeman at Sandal, gang plank fell on knee and heel.
12. Brakeman at Gillham got sand in eye.
13. Conductor, switching at Lake Charles, riding on footboard, struck cable spool.
15. Conductor, stepping from car to car, Belt Junction, sprained ankle.
16. Conductor, rerailing car, tie fell on foot, Marble City.
17. Brakeman, First District, got cinder in eye.
18. Fireman scalded at Frierson when hose came off.
19. Brakeman, Leesville, stepping across cupola inside standing caboose fell.
20. Fireman at Peno, foot scalded by squirt hose.
21. Fireman at Texarkana, water tank spout fell on foot.

22. Brakeman, unloading heavy iron at Fisher, it fell on foot.
23. Engineer at Kansas City strained back removing brake beam.
24. Conductor trying to get horse out of bridge, bar fell on foot.
25. Fireman at Trenton scalded by squirt hose.
26. Engine foreman at Lake Charles, stake fell on foot.
27. Brakeman at Horatio mashed finger opening car door.
28. Engineer at Baxter Springs struck finger with hammer.
29. Engineer at Shreveport scalded on legs by squirt hose.
30. Conductor on caboose ladder, Rich Mountain, bruised when slack ran up.
31. Switchman, Shreveport, ruptured when foot slipped setting brake.
32. Brakeman at Holmes, car door came off hanger onto foot.

[fol. 76]

33. Brakeman, Shady Point, loading cotton, run board fell on foot.
34. Fireman at Amsterdam sprained back using coal chute.

Year 1925

1. Engine foreman, Kansas City, taking up frog, it fell on foot.
2. Train Auditor, Poteau, dentist's gas tank fell on foot in car.
3. Brakeman at Gravette, barrel of vinegar fell on instep.
5. Brakeman at Neosho, crate of lard fell on foot.
6. Brakeman at Howe, unloading barrel of paint, it caught his hand against door.
7. Brakeman at Anacoco dropped frog on foot.
8. Brakeman at Sulphur got hot sand in eye.
9. Fireman at Hume got sand in eye.
10. Coal passer Stilwell, helping unload fly-wheel, it fell on heel.
11. Engineer at Asbury got particle of sand in eye.
12. Brakeman at Amsterdam, unloading coal apron, it fell on foot.
13. Engineer Blanchard, repairing hose, startled by steam, jumped and struck his side on engine step.

14. Coal chute attendant, helping load box dry goods, ruptured.
15. Brakeman at Cove stepped on rock, sprained ankle.
16. Engineer at Kansas City got sand in eye.
17. Engineer at Heavener got cinder in eye.
18. Brakeman at Spiro, uncoupling steam hose, scalded.
19. Brakeman at Neame, unloading empty gas drum, sprained back.
20. Conductor at Belt Junction, walking alongside train, stumbled over pipe, broke two ribs.

[fol. 77] Year 1924

1. Brakeman at Richards, slack ran in, cut hand on stove anchor rod.
2. Engine foreman at Texarkana struck by rock thrown by unknown.
3. Brakeman at Spiro, arm, head and chest bruised when slack ran up.
4. Switchman at Joplin, brake club slipped and hit him on head.
5. Engine foreman, Sugar Creek, runboard from car to rock fell on him.
6. Fireman at Shreveport, taking oil, spout slipped out of hands and struck head.
7. Crossing flagman, Kansas City, struck by nut from passing train.
8. Engineer at Merwin burned on face by flames from fire box.
9. Fireman at Heavener, taking water and foot slipped off spout hit by lever.
10. Switchman, walking between tracks, stumbled on switch chain.
11. Brakeman at Noel wrenched back lifting sack of sugar.
12. Brakeman at Many, setting brake on car of logs, which shifted when coupling made.
13. Brakeman at Rodessa, setting brake on car of logs, which shifted when coupling made.
14. Conductor at McFadden, helping unload gravel, dump lever struck him.
15. Switchman at Shreveport, riding front footboard when auto was struck.
16. Brakeman at Leesville, tie fell from car and struck him.

17. Brakeman at Hume had rib broken when slack taken out of train.
18. Switchman, Knoche, setting brake, when chain rolled off and he fell against car.
19. Engineer at Worland scalded by squirt hose when he opened injector.

[fol. 78]

20. Engineer at Westline strained back handling reverse lever.
21. Fireman at Anacoco scalded when squirt hose blew off.
22. Brakeman at Gandy, walking along track, stepped on nail.
24. Switchman at Shreveport, setting frog, cut wrist on rail sliver.
24. Brakeman at Coal Creek, lifting barrel, sprained back.
25. Switchman at Kansas City stepped on nail.
26. Brakeman at Lewis, handling casting, which fell on foot.
27. Fireman at Shreveport, squirt hose burst, scalding his back.
28. Engineer at Poteau, handling reverse lever, bruised hand.
29. Brakeman at Vandervoort dumped bale of cotton on floor rack, which flew up and struck him.
30. Conductor at Noel, lifting sack of seed, sprained back.
31. Switchman at Kansas City, removing air hose, wrench slipped, back bruised.
32. Switchman at Pittsburg, using pipe to start car, sprained back.
33. Brakeman at Poteau, lifting green hides on car, sprained back.
34. Switchman at Kansas City jumped off dock onto a cob, sprained ankle.
35. Switchman at Kansas City stumbled over a pile of ties in yard.
36. Brakeman at Siloam, back bruised when slack ran up.
37. Switchman at Kansas City got particle of steel in eye.
38. Switchman at Kansas City, riding in door of stock car, bruised when slack ran up.
38a. Track laborer, Howe, struck by empty bottle thrown from train.

[fol. 79]

39. Switchman, Kansas City, got finger caught under derailing frog.
40. Special officer at Watts shot by trespasser.
41. Brakeman at De Quincy, riding in caboose, had hip bruised by stop.
42. Fireman at Pittsburg, taking water, when crane lever slipped and struck his head.

Year 1923

1. Brakeman at Gravette got sand in eye.
2. Swtchman at Heavener, riding end of gondola, end gate bruised hand.
3. Fireman at Vandervoort got sand in eye.
4. Switchman at Port Arthur wrenched back picking up pipe.
5. R. H. foreman at Kansas City, in deck of engine, caught foot in reverse lever slot.
6. Brakeman at Fuller, lighting fuse, burned hand.
7. Engineer at Heavener, taking off dope cup cap, wrench slipped, hurt hand.
8. Brakeman at Eve, warming hands in fire door, when it closed on his hand.
9. Freman at Pittsburg scalded by squirt hose.
10. Engineer at Shreveport, two fingers cut in guider.
11. Section laborer at Andersen, unloading tier, dropped one on foot.
12. Switchman at Kansas City, switch chain broke and struck groin.
13. Section laborer at Lanagan, unloading tier, one fell on foot.
14. Fireman at Bunch bursted blower pipe, scalded arm.
15. Switchman at De Queen, setting brake, wrenched finger.
16. Conductor at Watts, riding front footboard shoving car, had leg bruised.
17. Station helper at Heavener, unloading casting, mashed finger.

[fol. 80]

18. Brakeman at Gans, removing brake beam, sprained shoulder.
19. Fireman, taking oil, gas exploded, knocking him off tender.

20. Flagman on crossing Texas avenue, Shreveport, run over by auto.
21. Fireman at Mulberry, foot slipped in deck, wrenched back.
22. Fireman at Lisle, climbing down off tender, foot slipped, bruised side.
23. Fireman let sand box lid fall on finger at Sallisaw.
24. Engineer at Fuller, doctoring hot pin, grease burned hand.
25. Brakeman at Zwolle, running alongside of car, stumbled over obstruction, spraining ankle.
26. Fireman at Stillwell, using clinker hook, mashed finger.
27. Wrecker fireman at Holmes Park, chain broke, flew, broke arm.
28. Fireman, Watts, sand in eye.
29. Conductor at derailment, Hatton, angle bar flew off, bruised face.
30. Brakeman at Bacon, placing frog to rerail, thumb mashed.
31. Switchman, Kansas City, cinder blew in eye.
32. Brakeman at Mulberry, closing car door, bruised little finger.
33. Special officer, riding train at Kansas City, shot by trespasser.
34. Engine foreman, walking across tracks, Kansas City, stumbled, head cut on rail.
35. Brakeman at Leesville stepped on nail.
36. Brakeman at Page sprained back handling freight.
37. Engine foreman at Kansas City, passing by engine, scalded by steam from blow-off cock.
38. Fireman at Baron scalded by squirt hose.
39. Hostler helper at Kansas City scalded by squirt hose.

[fol. 81]

40. Fireman at Kansas City, putting in a fire, wrenched back.
41. Engineer at Mansfield scalded when steam pipe bursted.
42. Car inspector at Fort Smith crushed between cars.
43. Train porter at Amoret strained back lifting milk can.
44. Conductor at Zwolle, unloading freight, fell from gang plank.
45. Brakeman at Ashdown, flagging crossing, run over by auto.

46. Fireman at Kansas City got foreign particle in eye.
47. Brakeman at Pittsburg, walking along track, sprained ankle.
48. Conductor at Decatur, walking along track, sprained ankle.
49. Fireman at Shreveport burned by explosion of gas in fire box.
50. Engine foreman at Kansas City, climbing over fence to open gate, sprained knee.
51. Fireman at Kansas City, getting off seat box, foot slipped, sprained ankle.

Year 1922

1. Baggageman at Oil City claims sprained back handling baggage.
2. Fireman at Oskaloosa, fire door closed on finger.
3. Brakeman at Sallisaw, handling freight, bruised thumb.
4. Brakeman at Gentry bruised finger closing car door.
5. Fireman at Merwin, engine lurched, caused sprained wrist.
6. Brakeman at Gravette, in car, table fell on his toes.
7. Switchman at Kansas City, riding engine, scalded when grate stud blew out.

[fol. 82]

8. Switchman at Kansas City, turning water crane, bruised arm.
9. Switchman at Shreveport, checking car, chock flew up and bruised hand.
10. Brakeman at Bloomburg, driving spike with knuckle pin, cut eye.
11. Section laborer, in car of tier at Spiro, when coupled tie fell on foot.
12. Brakeman at Gravette, going back to flag, sprained ankle.
13. Switchman at Kansas City, carrying tie, it fell on foot.
14. Brakeman at Ravenna, engine deck apron struck ankle.
15. Hostler helper at Pittsburg, struck by reverse lever.
16. Brakeman at Hatfield got sand in eye.
17. Brakeman at Gillham, scalded by steam from blow-off cock.
18. Switchman at Pittsburg got cinder in eye.

19. Fireman at Merwin, finger bruised in fire door.
20. Brakeman at Mena, slack ran up, thrusting his hand through window.
21. Traveling fireman at Zwolle, hand burned by steam.
22. Fireman at Texarkana, gas in fire box exploded, burning him.
23. Brakeman at Lisle scalded by steam from blow-off cock.
24. Brakeman at Gandy stepped on a nail.
25. Baggageman at Horatio, train movement toppled trunk on foot.
26. Engineer at De Queen got sand in eye.
27. Hostler helper at Pittsburg, chunk of coal fell on his head.
28. Brakeman at Hume, lining derail, mashed finger.
29. Baggageman at Watts, engine spring thrown into car on foot.

[fol. 83]

30. Engineer at Asbury, wrench slipped, struck elbow.
31. Fireman at Amsterdam, taking down rod, bruised hand.
32. Assistant yardmaster at Kansas City, moving draw bar, it fell on foot.
33. Brakeman at Neal Springs, scalded by steam from cylinder.
34. Fireman at Mena, scalded by squirt hose.
35. Fireman at Gravette got sand in eye.
36. Engineer at Westville scalded by squirt hose.
37. Fireman at Worland scalded by steam in ash pan.
38. Engineer at De Queen, thumb bruised by reverse lever.
39. Engineer at Shreveport, hand bruised by reverse lever.
40. Engine watchman at Watts, taking coal, leg caught between apron and cab.
41. Brakeman at Stapp claims back strained handling freight.
42. Brakeman at Siloam, cutting rope, knife slipped and cut leg.
43. Brakeman at Merwin, taking down brake beam, bruised thumb.
44. Section laborer at Drexel struck by tie.
45. Brakeman at Watts, got cinder in eye.
46. Fireman at Air Line Junction, got cinder in eye.
47. Switchman at Beaumont, setting brake, wrenched back.
48. Fireman at Port Arthur, scalded by squirt hose.

49. Conductor at Pittsburg, spark from fuse fell in shoe.
50. Fireman at Gans, scalded by squirt hose.
51. Brakeman at Chaison, piece of steel stuck in hand.
52. Brakeman at Dorsey, wire on side of car struck in ear.
53. Brakeman at Mooringsport, handling freight, bruised knee.

[fol. 84]

54. Brakeman at Shady Point, opening car door, it fell on his back.
55. Brakeman at Shreveport, scalded when engine crown sheet failed.
56. Fireman at Fort Smith, scalded by squirt hose.
57. Machinist helper at De Queen, under engine, when engineer opened injector and scalded him.
58. Section foreman at Cleveland, unloading rails from car, one fell on foot.
59. Brakeman at Rich Mountain, doctoring hot box, burned hand.
60. Fireman at Pittsburg, scalded by squirt hose.
61. Engine foreman at Kansas City stepped on nail.
62. Engineer at Gans, placing rerailing frog, it fell on shin.
63. Brakeman at Spiro, going through cab door, cut wrist.
64. Engineer at Tipton Ford claimed engine riding hard cramped legs.
65. Switchman at Gas Center stepped on nail.
66. Brakeman at Siloam Springs lost balance, burned hand on stove in caboose.
67. Fireman at Joplin, taking oil, explosion knocked him off tank.
68. Engine watchman at Kansas City, shoveling coal, lump fell on foot.
69. Engineer at Mena, wrench slipped, scalded hand.
70. Fireman at Spiro, fire door closed on finger.
71. Fireman at Shreveport, gas exploded in fire box, burning face.
72. Engineer at Kansas City, cinders and dirt in eye from squirt hose.
73. Brakeman at Bloomburg, closing car door, bruised fingers.
74. Fireman at Pittsburg, examining fire, flash burned face.
75. Brakeman at Panama, fell while handling freight.

[fol. 85] Year 1921

1. Switchman at Kansas City, under car to cut out air brake, head struck by lever.
2. Baggageman at Neosho claims back strained loading trunk.
3. Brakeman at Cleveland, loading grain doors, bruised hand.
4. Switchman at Kansas City, riding end of gondola, fingers bruised by wheels.
5. Switchman at Kansas City, walking through yard, stepped on stone, turned ankle.
6. Fireman at Siloam Springs got foreign particle in eye.
7. Brakeman at Cleveland got foreign body in eye.
8. Brakeman at De Ridder, pulling switch chain, ruptured.
9. Engineer at Sandel, injured in boiler explosion.
10. Fireman at Sandel, injured in boiler explosion.
11. Brakeman at Sandel, injured in boiler explosion.
12. Conductor at Sallisaw, scalded by squirt hose.
13. Engineer, Watts to Heavener, got cinder in eye.
14. Fireman at Sulphur Springs, scalded by squirt hose.
15. Engineer at Pittsburg, scalded by squirt hose.
16. Engineer at Black Fork Tank, stepped on brick in dark, sprained ankle.
17. Train porter at Gravette claims strained back lifting coop of chickens.
18. Switchman at De Queen, walking over car gravel, sprained ankle.
19. Switchman at Kansas City got cinder in eye.
20. Conductor at De Queen, unloading tier, strained back.
21. Brakeman at Mansfield, scalded by hot water from injector.
22. Fireman at Lyons got cinder in eye.
23. Engineer at Worland, rod cup grease blew out, burning face.

[fol. 86]

24. Conductor at Pittsburg missed hold, swinging against car, sprained shoulder.
25. Yardmaster at Heavener, stepped in depression, sprained instep.
26. Conductor, walking in yard at Joplin, sprained ankle.
27. Brakeman at Eve, face cut in altercation with hobo.

28. Brakeman at Worland, opened angle cock hose, struck elbow.
29. Engineer at Lisle, doctoring hot box, got hot grease in eye.
30. Engineer at Pittsburg, sand blew in eye.
31. Fireman at Lisle, hand burned by steam.
32. Switchman at Kansas City, foreman dropped frog on his hand.
33. Switchman at Kansas City, passing from car to car, skinned shin.
34. Conductor at Grandview got cinder in eye.
35. Foreman at Heavener scalded by sqiurt hose.
36. Switchman at Kansas City, releasing brake, bruised finger.
37. Train porter at Fort Smith fell off truck, skinned shin.
38. Brakeman at Peno, reaching for brake valve, fell from seat.
39. Train porter at Watson, shot by bandits.
40. Brakeman at Trenton shot by unknown.
41. Engineer at Asbury, scalded and bruised when side rod broke.
42. Fireman at Asbury, scalded and bruised when side rod broke.
43. Brakeman at Asbury, scalded and bruised when side rod broke.
44. Fireman at Holmes had fingers bruised by fire door.
45. Brakeman at Merwin, stepped in hole, sprained ankle.

[fol. 87]

46. Engineer at Pittsburg, oiling around, fell in cinder pit.
47. Fireman at Doty struck by flying gravel.
48. Engineer at Siloam Springs, between engine and car to chain up, engine rolled back, bruising chest.
49. Brakeman at Converse, foot bruised by oil barrel rolled by other brakeman.
50. Brakeman at Grandview, releasing brakes, bruised fingers.
51. Conductor at Pittsburg, fingers mashed by gate of car.
52. Brakeman at Heavener, strained in groin handling freight.
53. Brakeman at Sallisaw, closing car door, bruised hand.

[fol. 88] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF H. P. GALBREATH—Filed Nov. 22, 1929

STATE OF ARKANSAS,
County of Sebastian, ss:

H. P. Galbreath, being duly sworn, deposes and says:

I am superintendent of the Central Division of the Missouri Pacific Railroad Company, which extends from Little Rock through the State of Oklahoma to Coffeyville, Kansas, and have supervision over the Operating Department of said Company on said Division. My headquarters are in the City of Van Buren, State of Arkansas.

I am familiar with the Arkansas Full-Crew Laws and the result of operating freight trains and switch engines under the provisions of said acts.

Qualifications

I have been connected with the Missouri Pacific Railroad Company since 1905 as train dispatcher, chief train dispatcher, trainmaster and superintendent. I was located at De Soto and Poplar Bluff, Missouri, as train dispatcher, chief train dispatcher and trainmaster until May 1, 1926. I was superintendent at Atchison, Kansas, for the Missouri Pacific Railroad Company from June 1, 1926, to December 1, 1926, and since then have been located at Van Buren as superintendent.

Effect of Operations under Full-train-Crew Law

To comply with the full-train-crew law it is necessary to have a third brakeman on all trains out of Van Buren to Greenwood Junction, Oklahoma, a distance of 6.38 miles. [fol. 89] The third brakeman rides the train for this six miles, and it is necessary to either stop or slow down the train to permit him to get off at Greenwood Junction, where he remains until a southbound freight train reaches there, and it is then necessary for a southbound freight train to either stop or slow down so that he may get on the train for the purpose only of riding to Van Buren to comply with the law. These same trains operate between Coffeyville, Kansas, and Greenwood Junction, Oklahoma, with

only. two brakemen, and the trains are just as efficiently managed and operated as they are with the third brakeman.

We have about ten freight trains a day between Coffeyville, Kansas, and Van Buren, Arkansas, and upon each of these trains between Greenwood Junction, Oklahoma, and Van Buren, Arkansas, to comply with the law, it is necessary to have the third brakeman.

Unnecessary and Additional Cost of Operation

The first twenty-four days of October there was a total expense for this service covering the six miles in question of $494.27, or $20.59 per day. In a number of cases this third brakeman is only on duty for a period of one hour and thirty minutes to two hours from his departure at Van Buren until his retrun, where he is relieved, and he is paid wages for a full eight-hour day.

In addition to the unnecessary expense of the third brakeman riding the train for the distance of six miles between these points there is the expense of either slowing the train down or stopipng to permit the third brakeman to board the train or to alight therefrom.

[fol. 90] Full-switching-crew Law

To comply with the full-switching-crew law it is necessary to have a foreman and three switchmen with each engine, the switchman's rate being $6.62 per day of eight hours.

At Fort Smith we maintain four engines daily, except Sunday, and three engines on Sunday, the year around, working additional crews as needed to take care of the business. The fifth crew having been worked at this point the past month, which is an additional and unnecessary expense, to comply with the law, under the present conditions of approximately $33.00 a day in Fort Smith.

At Van Buren train yard we operate four crews the year around, and one to two additional crews a greater part of the year, during the heavy coal and vegetable movement, five crews working during the month of October, or an additional and unnecessary expense of approximately $33.00 a day.

There are no duties performed or required to be performed by the additional switchman that could not be readily and easily performed by the foreman and two switchmen.

The expense of complying with this law at Van Buren, Fort Smith, and between Van Buren and Greenwood Junction, Oklahoma, amounts to the sum of approximately $86.00 per day.

Economical Waste

To comply with the full-train-crew and switching laws of Arkansas necessarily involves an economical waste. In the State of Oklahoma, or in Kansas, where there is no such law, the trains are just as efficiently managed and operated, [fol. 91] and with the same degree of safety, with only two brakemen, as they are in the State of Arkansas, and the same is true in the operation of switch engines in the State of Arkansas as compared with that of Oklahoma, Kansas, Missouri and other States where they have no such law.

H. P. Galbreath.

Subscribed and sworn to before me this 26th day of October, 1929. Ora Stuart, Notary Public. My commission expires 7-21-32. (Notarial Seal.)

[fol. 92] In United States District Court

Affidavit of O. A. Garber—Filed Nov. 18, 1929

State of Missouri,
City of St. Louis, ss:

O. A. Garber, Chief Mechanical Officer of the Missouri Pacific Railroad Company, makes this affidavit to be used in the proceeding by the Missouri Pacific Railroad Company, to test the validity of the Arkansas Extra Switchman Law and the Arkansas Extra Brakeman Law, by suit in the United States District Court in the State of Arkansas, and affiant states:

Qualifications

That since the year 1891, affiant has been continuously engaged in the railroad mechanical department of different

railroads, and his experience embraces the following service:

In 1891, affiant was Machinist Apprentice, working in the shops of the Wabash Railroad Company at Springfield, Illinois. Continuously for eleven years he was respectively, Machinist Apprentice, Machinist and Air Brake Foreman, in the shops of the Wabash Railroad Company. In the year 1902, affiant entered the service of the Baltimore & Ohio Railroad, at Bridgeport, Ohio, as Roundhouse Foreman. He continued as Roundhouse Foreman with the Baltimore & Ohio until the year 1903, when he entered the service of the Illinois Central Railroad at Paducah, Kentucky, as Machinist on air brake work. He continued in the service of the Illinois Central, as Roundhouse Foreman, Machinist Foreman and General Foreman, and then was in service of the Illinois Central as General Foreman at Mounds, Illinois, when he was made Master Mechanic for [fol. 93] the Illinois Central at East St. Louis, in the year 1911. He continued in the service of the Illinois Central as Master Mechanic at East St. Louis until the year 1917, when he was transferred to Waterloo, Iowa, in the capacity of Master Mechanic for the Illinois Central, and in the year 1918 he was transferred to Memphis, Tennessee, where he continued Master Mechanic until the year 1925, when he came to St. Louis as Mechanical Superintendent of Missouri Pacific Lines. He was appointed Chief Assistant Mechanical Officers of Missouri Pacific Lines in July, 1925, and since the fall of the year 1925 he has been Chief Mechanical Officer for the Missouri Pacific Lines.

Improvements in Equipment Since Enactment of Full Crew and Full Switching Crew Laws

That since the enactment of the Arkansas Extra Brakeman Law and the Arkansas Extra Switchman Law, the Missouri Pacific, with a view of promoting the safety of operations upon the lines of railroad operated by said company, has adopted the following safe-guards and improvements, all of which tend to lessen the hazard of service of the men employed in switching service and freight train operations.

That since the enactment of said laws by the State of Arkansas, the Government inspection of engines, power,

freight and passenger cars and other equipment, which prior to the enactment of said laws was negligible, has been taken over completely by the Federal Government and the engines, freight and passenger cars and other power and equipment of the Missouri Pacific and other railroads operating in the State of Arkansas are now very thoroughly inspected and tested by Government inspectors, [fol. 94] and all of the engines, power, freight and passenger cars and other equipment operated by the Missouri Pacific and other railroads in the State of Arkansas is subjected to most rigid Government inspections and tests.

That since the year 1903, upon the dates hereinafter set forth, the Interstate Commerce Commission has, by orders entered of record, required that the following percent of the cars in freight trains should be equipped with automatic air brakes to be operated from the engine, all of which cars are required by order of the Interstate Commerce Commission to be in good operating condition before leaving the different terminals, viz.;

On 2nd day of March, 1903	50 per cent.
On 15th day of November, 1905	75 per cent.
On 6th day of June, 1910	85 per cent.

That since the year 1913, within the knowledge of affiant, the Missouri Pacific has made the following improvements in its equipment, all of which tend to promote the safety of the employes engaged in the switching and train service of said company, viz.:

Under Orders of American Railroad Association

Single plate cast-iron wheels are being substituted for double plate wheels, upon all freight trains.

Cast steel side frames on all trucks on freight cars have been substituted for arch bar trucks as the cars are rebuilt, and all new cars purchased contain the cast steel side frames of the standard A. R. A. type.

Friction steel draft gear has been substituted upon all new equipment and upon all freight cars that are rebuilt, for the last five years upon the Missouri Pacific Railroad. [fol. 95] Steel draft arms have been substituted in place of wooden draft arms, and all freight cars purchased have

contained steel ends instead of wooden ends, and on all new equipment and equipment being rebuilt wooden underframes have been discarded for steel ends and steel underframes, upon said railroad.

That booster hand-brakes have been substituted upon all freight cars since the year 1923, in place of the ordinary hand brakes, and the substitution of booster hand-brakes for the old hand-brakes was in accordance with an Interstate Commerce Commission ruling of 11th day of March, 1911.

That since the year 1913, all engines on the Missouri Pacific have been brought up to the latest type of automatic air brake, and all engines now in freight service upon the Missouri Pacific Railroad are so equipped that brakes can be applied through the automatic system, and straight air can also be applied, and all cars on the train can be released and train held with the straight air while recharging the auxiliaries in train line. This was not possible when the Extra Switchman and Extra Brakeman Laws were passed, when the older type of air brake was in use upon the Missouri Pacific Railroad.

Since the passage of this law new and improved equipment was placed in service. These improvements consist largely of the adoption of the K triple valve on freight cars, in which the following features are embodied that lessen the hazards and duties of train service employes:

1. "Quick service feature," that is, that the graduating and slide valve in the triple valve so move on the first brake pipe reduction made by the engineer with the brake valve [fol. 96] that every triple valve makes a slight brake pipe reduction, thereby getting a more uniform serial application of the brakes, and lessening the slack action throughout the train.

2. "Uniform recharge." That when the engineer places his brake valve in full release position to release the brakes and recharge the brake pipe and brake system that the flow of air to the auxiliary reservoirs is restricted so that the auxiliary reservoirs on the rear portion of the train can charge uniformly with the head portion of the train, thereby securing a more uniform recharge of the entire brake system.

3. "Retarded release." By this means in releasing the brakes on a long freight train the flow of air from the brake cylinders on the forward portion of the train is restricted while the flow of air on the rear portion of the train is unrestricted and the entire train has a uniform release, thereby eliminating the running in and out of slack action.

The installation of these "K" triple valves on the Missouri Pacific has meant the discarding and scrapping of a large number of the old type "H" and "F" triple valves at a great expense to the Missouri Pacific Lines.

On passenger train cars the P. M. equipment, which is just a plain triple valve with an auxiliary reservoir for storage of the air has been in practically all cases superseded by the L. N. equipment to which an extra reservoir is attached, known as the emergency reservoir, thereby being able to gain a graduated release of the brakes, which brings about smoother train handling and a quick recharge of the auxiliary reservoir and brake system, in addition to a large storage of air to be used in emergency, bringing about a much safer and quicker stop.

[fol. 97] All passenger equipment cars built since 1922 have been equipped with the Universal Control valve which is the very latest type of air brake equipment. This valve takes the part of triple valve and in addition to the graduating feature of the triple valve has the quick service feature and high emergency brake cylinder pressure available at all times, a protection valve feature by which means the brakes on the train are thrown to emergency should the brake pipe pressure be reduced to 35 pounds regardless of the engineer's action.

The installation of these features have greatly increased the comfort of train service employes by the elimination of slack action and a quicker and more positive release of the brakes and have greatly added to their safety by the high brake cylinder pressure in emergency.

In addition to these improvements in Air Brakes the Missouri Pacific has adopted the very latest retaining valve placed in a position for easy access on all freight cars for the purpose of holding brake cylinder pressue if desired in certain cars while releasing brakes. Also the very latest bleed cock has been adopted whereby it is possible in switching cars to bleed the pressure from the auxiliary

reservoir for the purpose of switching in from 3 to 5 seconds, whereas in releasing brakes with the old style bleed cocks it took from 28 to 35 seconds. This means a considerable saving of time to the train service employes.

At the time the extra brakemen and switchmen's laws were passed all brake cylinder packing cups were of leather with expanding rings and gaskets of leather. Since that [fol. 98] time the Missouri Pacific has adopted a composition packing cup and composition gasket which give more satisfactory service in brake operation.

Carefully compiled records since February, 1925, show there has been a decided improvement in train handling on Missouri Pacific and a reduction in number of slid flat wheels and cases of trains parting which has been brought about by improvement in the maintenance of air brake equipment at considerable expense to the Railroad Company and greatly to the convenience of train service employes.

The general condition of the air brakes throughout the country is shown by the report of the Director of the Bureau of Safety of the Interstate Commerce Commission for the year 1928, in which on page 3 the following statement is made:

"During the year air brake tests were made on 2807 trains made up for departure from terminals, these trains consisting of 114,643 cars; air brakes were found operative on 114,026 of these cars, the average percentage of cars in trains which were controlled by air brakes being 99.47 per cent. Air Brake tests were made on 1,383 trains upon their arrival at terminals, these trains consisting of 67,923 cars; air brakes were found operative on 65,804 cars, the average percentage of cars in trains tested upon arrival at terminals having operative air brakes being 96.87 per cent."

That all of the above improvements in engines, power, freight cars, passenger cars and other equipment adopted by the Missouri Pacific Railroad have had the natural effect of lessening the hazard of the service and promoting the safety of the employes engaged in service upon the engines and freight trains of said company.

[fol. 99] Conclusion

That affiant is familiar with the standard practice of the Missouri Pacific Railroad and other railroads outside the State of Arkansas and within the knowledge of affiant, the through freight train crew in all states other than the State of Arkansas consists of a conductor and two brakemen and a standard freight switching crew on all railroads with which affiant is familiar, outside of the State of Arkansas, consists of a foreman and two switchmen.

That in the opinion of affiant, the employment of the extra switchmen and extra brakemen required by the laws of the State of Arkansas is wholly unnecessary to secure either safety or efficiency in switching or freight train operations, and in the opinion of affiant compliance with said laws is both an unreasonable and uneconomical practice.

O. A. Garber.

Subscribed and sworn to before me, this 22nd day of October, A. D. 1929. Geo. Franz, Notary Public. My commission expires Aug. 5th, 1930. (Seal.)

[fol. 100] In United States District Court

Affidavit of E. A. Hadley—Filed Nov. 18, 1929

State of Missouri,
City of St. Louis, ss:

E. A. Hadley, Chief Engineer of the Missouri Pacific Railroad Company, makes this affidavit for use in the suit instituted by the Missouri Pacific Railroad Company in the District Court of the United States in the State of Arkansas to test the constitutionality of the extra switchmen and extra brakemen laws of said State, and said E. A. Hadley deposes as follows:

Qualifications

I graduated from the Lowell High School, Lowell, Mass., in the year 1897. I was then apprenticed for four years to an engineering firm of Lowell, Mass., where I had a com-

bined course of study and practice in engineering. From September, 1900, until June, 1910, I was employed by the Boston & Maine Railroad in various positions from draftsman, assistant engineer, resident engineer to Engineer of Construction, and came to the Missouri Pacific as Engineer of Design on June 1, 1910, serving in that capacity and as Principal Assistant Engineer until May 1, 1915, when I was appointed Chief Engineer, and since this time I have been Chief Engineer, in charge of engineering and construction, and for several years also had charge of maintenance of way and structures.

Improvements and Safety Devices Constructed and Installed in the State of Arkansas Since 1920

That as Chief Engineer of the said Missouri Pacific Railroad Company affiant has had charge of the construction and installation of various improvements and safety de-
[fol. 101] vices upon said railroad in the State of Arkansas since the year 1920. That among the improvements and safety devices installed in Arkansas upon said railroad since said period, all of which were intended to and did make for the safer and more expeditious handling of traffic and for the safety of the traveling public and the company's employes, were the following:

Automatic Block Signals, upon the main line across the entire State of Arkansas, from the Missouri-Arkansas line to Texarkana, at a cost of	$2,106,859
Second Main Tracks—51.49 miles at a cost of	1,824,516
Elimination of Highway Grade Crossings—cost	35,790
Baring Cross Bridge—cost	1,310,403
Raising track above flood plane—cost	1,039,172
Telephone Train Dispatching System—cost	253,393
Manual Block System—cost	5,086
Heavier Rail—cost	6,371,650
Passing tracks—26.34 miles—cost	545,517
Ballasted Track—280.89 miles—cost	807,483
Total	$14,299,869

Conclusion

That since the year 1920, all of said improvements and safety devices above enumerated have rendered the operation of freight trains and switch engines upon the Missouri Pacific Railroad in the State of Arkansas, safer, and the [fol. 102] employes operating said trains less subject to accident while in the service of such company than prior to the installation and operation of said improvements and safety devices.

That affiant is familiar with the operation of trains and switch engines in the other states through which the Missouri Pacific Railroad operates, and that the standard freight crews consist of one conductor and two brakemen regardless of the length of freight trains operated in all of said states, and the standard switching crew consists of one foreman and two helpers in all the states through which the Missouri Pacific operates, with the exception of the State of Arkansas.

That in the opinion of affiant the extra switchmen and extra brakemen required by the laws of Arkansas is an extravagant and uneconomical practice and does not make for the safety of operations, and in the opinion of affiant the employment of said extra switchmen and extra brakemen required by the laws of Arkansas is wholly unnecessary.

E. A. Hadley.

Subscribed and sworn to before me this 18th day of October, 1929. Carl A. Rosen, Notary Public. My commission expires April 19, 1930. (Seal.)

[fol. 103] In United States District Court

Affidavit of E. H. Holden—Filed Nov. 18, 1929

State of Missouri,
County of Jackson, ss:

1. E. H. Holden, being duly sworn, on his oath states that he is General Superintendent of Transportation for The Kansas City Southern Railway Company, and has been so employed by said Railway Company since September, 1912; that from January 1, 1910, to September, 1910, he was employed by said Railway Company as Superintendent of its Southern Division, which extended from Mena, Ar-

kansas, to Port Arthur, Texas, from September, 1910, until September, 1912, after which it extended from DeQueen, Arkansas, to Port Arthur, Texas; and that from February, 1906, to January 1, 1910, with the exception of a short interval, affiant was employed by said Railway Company as Trainmaster at Shreveport, Louisiana. Affiant further states that in his experience as Trainmaster, Division Superintendent and General Superintendent of Transportation, he has had charge of and supervision over the operation of trains on said railway and the direction of and responsibility for train and switch crews, and has had occasion to study and observe the effect of the laws regulating the number of men required in train crews and switch crews, and more particularly the statutes of the State of Arkansas with respect thereto.

2. Affiant further states that the railroad of The Kansas City Southern Railway Company extends from Kansas City, Missouri, to Port Arthur, Texas, a distance of 786 miles; that it is divided into seven operating districts; that [fol. 104] parts of three of these districts, to-wit, the second, fourth and fifth, are in the State of Arkansas; that said railway enters Arkansas near the northwest corner of the state and extends through a portion of Benton County, a distance of approximately 28 miles, it then extends into Oklahoma to a point near Howard, in Polk County, Arkansas, and thence south to the Texas state line beyond which it extends in Bowie and Cass Counties, Texas, to a point in Miller County, Arkansas, and crosses a portion of Miller County, Arkansas, for a distance of approximately six miles, to the intersection of the Louisiana state line; that there is also a branch of said railway extending from Spiro, Oklahoma, to Fort Smith, Arkansas, approximately one mile of which is within the State of Arkansas. Affiant further states that, with the exception of Fort Smith, Arkansas, there are no towns at the various points where said railroad crosses the Arkansas state line, nor places at said state line where accommodations can be secured by the extra brakeman if laid off at the state line, so that, as a result of said Arkansas Statutory Crew Laws, said Railway Company has been compelled to carry an additional brakeman on each of its freight trains operated between Lanagan, Missouri, and Watts, Oklahoma, on its

second district, and between Heavener, Oklahoma, and DeQueen, Arkansas, on its entire fourth district, and between DeQueen, Arkansas, and Shreveport, Louisiana, on its entire fifth district, although, as to the fifth district, only 52.5 miles out of a total distance of 124.7 miles is in the State of Arkansas; that the situation is more graphically shown on the attached map (Exhibit "A"), showing the various operating districts, and in yellow line those portions of said [fol. 105] railroad within the State of Arkansas.

3. Affiant further states that during the ten years ending December 31, 1928, said Railway Company has expended for additional brakemen and switchmen solely by reason of the Arkansas Statutory Crew Laws, and not by reason of any requirements of said Railway Company, either for safety or convenience in operation, or otherwise, than solely to comply with said statutes, the following sums:

Year	Cost of additional brakemen	Cost of additional switchmen	Total
1919	$27,073.50	$4,855.31	$31,928.81
1920	41,635.07	9,228.80	50,863.87
1921	36,111.90	5,343.42	41,455.32
1922	38,652.21	5,020.45	43,672.66
1923	38,802.95	5,103.08	43,906.03
1924	33,394.92	4,398.42	37,793.34
1925	33,198.75	4,408.05	37,606.80
1926	33,921.88	4,568.19	38,490.07
1927	38,737.02	4,957.19	43,694.21
1928	38,578.56	4,366.50	42,945.06
	$360,106.76	$52,249.41	$412,356.17

4. Affiant further states that since the passage of the Arkansas Statutory Crew Laws, the Interstate Commerce Commission has increased the percentage of the cars that must be equipped with power brakes from 50 per cent of the cars in a train to 85 per cent of the cars in each train; and that now virtually all cars and all trains operated over said railway are equipped with air brakes and automatic [fol. 106] couplers, which are kept operative and in good condition, and there is a frequent inspection of said air brakes and couplers both by the Railway Company and by

representatives of the Interstate Commerce Commission. Affiant further states that during the ten years ending December 31, 1928, he has had charge of the reporting to the Interstate Commerce Commission of accidents on said railway involving a loss of time of three days or more, and has had occasion to investigate the causes of accident resulting from train operations; that these investigations have been made with a view to preventing the recurrence of avoidable accidents and eliminating unnecessary hazards of operation and seeing that disciplinary measures are administered where injuries or loss have been occasioned by negligence or carelessness; that the number of such accidents varies from year to year, and also varies on the different districts without any regard to or without being affected by the number of brakemen in road crews, or the number of switchmen in switch crews, or the number of cars per train.

5. Affiant further states that on freight trains carrying three brakemen, it is customary for one, called the forward brakeman, to ride on the engine, and for one, called the rear brakeman, to ride in the caboose with the conductor; that the third brakeman also usually rides in the caboose because of the complaint made by the men of the absence of any shelter for them if they ride in the middle of the train; that in the opinion of this affiant neither the extra brakeman nor the extra switchman required by the said Arkansas Statute are necessary or desirable, and they do not con-
[fol. 107] tribute to the safety of or efficiency in the operation of trains nor do they reduce or minimize the injuries to persons.

E. H. Holden.

Subscribed and sworn to before me this 15th day of October, 1929. Norman Brumwell, Notary Public in and for Jackson County, Missouri. My commission expires Feb. 10, 1931. (Seal.)

[fol. 108] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES E. HUTCHISON—Filed Nov. 18. 1929

STATE OF MISSOURI,
City of St. Louis, ss:

James E. Hutchison, being first duly sworn, deposes and says:

I am Vice-President of the St. Louis-San Francisco Railway Company and, as such, have supervision over the operating department of said Railway Company; my headquarters are at the City of St. Louis, State of Missouri, and I make this affidavit for use in suit filed in the District Court of the United States by the Missouri Pacific Railroad Company to test the validity, and restrain the enforcement, of the statutes of the State of Arkansas, commonly known as the Arkansas Extra Switchman and the Arkansas Extra Brakeman Laws, which prohibit, under penalty, the operation of switch engines and freight trains in the State of Arkansas without the employment of the extra switchman and extra brakeman required by said laws.

Qualifications

I am, and have been since January 1, 1924, Vice-President of the St. Louis-San Francisco Railway Company. I have been employed by said company for nearly twenty-seven years, and during the course of such employment have held official positions as follows:

Trainmaster,
Superintendent of Terminals,
Division Superintendent,
General Superintendent,
General Manager, and
Vice-President.

[fol. 109] Prior to my coming to the St. Louis-San Francisco Railway Company I was connected with various other railroads in various capacities as: Telegraph operator, station agent, train dispatcher, chief train dispatcher and trainmaster. By far the larger part of this employment was with the Chicago and Alton Railroad; although there was brief employment by the Denver & Rio Grande Western, Union Pacific, Chicago and Northwestern, and North-

ern Pacific, all of which was in the capacity of train dispatcher and the period involved on these four roads about two years. In these capacities, particularly that of trainmaster and superintendent, my duties required and I did spend a great deal of time in the yards and terminals with the switch engines and switch crews and on the road with the road trains and the road crews and have been very familiar with the duties of the men in this class of employment.

Operating Practices on St. Louis-San Francisco Ry. Co.

The use of the extra brakeman and the extra switchman in the State of Arkansas is a regulation that does not apply in any other state through which the St. Louis-San Francisco Railway Company operates. This Railway Company operates, in addition to the State of Arkansas, in the states of Missouri, Kansas, Oklahoma, Texas, Tennessee, Mississippi, Alabama and Florida.

There is nothing in conditions surrounding the operations in the State of Arkansas that is materially different from operations in other states. Our operation in the other states is just as efficient and just as safe and, in some respects more so, than in the State of Arkansas. The opera- [fol. 110] tion is safer in the other states in this respect: The injuries to men in train and yard service are found to be almost in exact proportion to the number of men employed, so that the additional brakeman and the additional switchman on the trains and in the yards in the State of Arkansas add an additional number of employes and the injuries to these men are higher in just about this proportion. These figures, of course, fluctuate badly from time to time, but over a period of years this statement seems to be borne out by the facts.

The St. Louis-San Francisco Railway Company has a line of railroad running from Memphis, Tennessee, to St. Louis, Missouri. Our freight trains leaving Memphis for St. Louis cross the Mississippi River immediately and are in Arkansas, and they run in Arkansas for about eighty miles. These trains, leaving Memphis, are given in compliance with the law an extra brakeman and this extra brakeman is used across the State of Arkansas. For convenience these men go to Hayti, a short distance into Missouri. At this

point the extra brakeman is dropped and the trains are almost universally increased in size at this point. We will add from a very few to thirty or forty cars to the train and proceed with the train less the extra brakeman and handle these additional cars and this extra length train just as well with the one less brakeman as we did in Arkansas with the crew comprising an extra brakeman. Every man of operating experience knows this to be a fact and knows that there is absolutely no necessity for the extra switchman or the extra brakeman. It is simply an expense forced upon the railroads for which there is no reason and our economy of operation is hurt in that respect.

[fol. 111] Some two or three years ago a compilation of the amount paid by all the railroads in the State of Arkansas for this extra switchman and this extra brakeman showed the total expense by all railroads to be nearly a million dollars. I do not have the exact figures available but my recollection is it was between nine hundred thousand and one million dollars per year.

So far as the extra switchman in the yards is concerned: The fact that the State of Arkansas is the only state in the United States that has made any such requirement and the further fact that yards all over the United States are operated successfully, economically and safely with crews consisting of a foreman and two switchmen should make it apparent to anyone that the extra switchman is simply an expense forced upon the railroads by legislation and that there is no justification for this expense.

To my mind it is patent that the railroads of the United States cannot comply with the Federal Transportation Act in its injunction that we operate our railroads efficiently and economically and pay out one million dollars a year to surplus and useless men in yard and train service in the State of Arkansas.

There are engines in yard service occasionally where the work is of a character that an additional man is needed. The railroads are always quick to put on this additional man where he is needed because it is economy to do so. On the road trains there is no condition where an extra brakeman is needed on any through freight train. On local freight trains, which do the local work, the switching around the small stations, the loading and unloading of merchandise and work of that character, wherever the work with one of

[fol. 112] these local freight trains is heavy at all it is the universal practice of the railroad companies to put an extra brakeman on these trains. This is done because it is economy to do it because we can, by the use of the extra brakeman, do the work at stations quicker and get our trains over the road in a lesser number of hours thus producing not only economy but efficiency and this the railroads do in all the other states where there are no laws regulating.

James E. Hutchison.

Subscribed and sworn to before me this 11th day of October, A. D. 1929. My commission expires November 12, 1932. Walter Studt, Notary Public within and for the City of St. Louis, State of Missouri. (Seal.)

[fol. 113] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF F. P. JOHNSON—Filed Nov. 18, 1929

STATE OF MISSOURI,
City of St. Louis, ss:

F. P. Johnson, being duly sworn, deposes and says that he is, and for the last three years has been, Vice-President in Charge of Finances and Accounts of Missouri Pacific Railroad Company, with headquarters at St. Louis, and affiant further says:

That he entered the service of the Missouri Pacific Railway Company (predecessor company of the Missouri Pacific Railroad Company) in February, 1889, and was successively office boy, clerk and chief clerk; that he was appointed Auditor Disbursements July 10, 1912; Assistant General Auditor February 1, 1913; Federal Auditor, August 1, 1918; General Auditor, March 1, 1920, and was elected Vice-President April 1, 1926.

As Vice-President he is in charge of accounts and records of the company.

The laws of the State of Arkansas (Paragraph 8577, Chapter 149, Digest of the Statutes of the State of Arkansas, 1921), compels all railroads operating in the State of Arkansas, engaged in the transportation of freight in

trains of twenty-five cars or more, to equip the same with a crew consisting of not less than an engineer, fireman, a conductor and three brakemen.

Paragraph 8583, Chapter 149, compels all railroad companies owning or operating any yards or terminals in the cities within the state where switching or transferring of cars are made across public crossings within the city limits of the cities to operate their switch crew or crews with not [fol. 114] less than one engineer, a fireman, a foreman and three helpers, the train crew being covered by the Act of 1907, page 295, paragraph 1, the switching crew being covered by the Act of February 20, 1913, page 211, paragraph 1.

The increase in the cost of operation of Missouri Pacific Railroad Company as the result of the third brakeman on freight trains in the State of Arkansas averages $350,000.00 per annum, while the increase in expenses of Missouri Pacific Railroad Company by reason of the third helper on all switching crews in the State of Arkansas is $250,000.00 per annum, or a total increase in the out-of-pocket cost of the company of $600,000.00.

Section 15 (a) of the Interstate Commerce Act (added February 28, 1920) provides in part as follows:

"* * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of said rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe [fol. 115] different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate prop-

erty value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: Provided, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

"* * * (6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of [fol. 116] the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management, and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph 4."

"* * * (9) The Commission shall prescribe rules and regulations for the determination and recovery of the ex-

cess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective."

Complying with this section of the Interstate Commerce Act, the Interstate Commerce Commission issues an annual order to all common carriers, the last order being dated January 18, 1929, covering the net railway operating income or deficit, and the recovery and payment of excess earnings under the provisions of Section 15 (a) of the Interstate Commerce Act, for the year ended December 31, 1928, requiring the carriers to report to the Commission in the following form:

[fol. 117] EXHIBIT A.

Return of the (Name of reporting carrier of system:) ——
for the Year Ended December 31, 1928

Summary of Return

	As reported by respondent	For use by the Commission
No. 1. Value of the railway property of the reporting carrier or carriers held for and used in the service of transportation (Exhibit B)	.....	.....
No. 2. Six per cent of the value of the railway property held for and used in the service of transportation, as reported under No. 1	.....	.....
No. 3. The amount of net railway operating income or deficit for the year (Exhibit C)	.....	.....
No. 4. The amount of net railway operating income for the year (if any) in excess of 6 per cent of the value of railway property held for and used in the service of transportation (Excess of No. 3 over No. 2)	.....	.....

	As reported by respondent	For use by the Commission
No. 5. One-half of the excess, if any		
No. 6. In case of excess, amount and nature of remittance		

[fol. 118] This report to be supported by statements showing descriptions of the property, its mileage and its investment in road and equipment at the close of the year.

In compliance with the orders of the Commission, the Missouri Pacific Railroad Company has rendered its report to the Commission from year to year showing the Investment in Road and Equipment, Investment in Material and Supplies, and Current Cash, amount for the year 1921 being $394,174,088.38, amount reported for the year 1928 being $521,896,172.05, the Investment in Road and Equipment being, for the year 1921, $381,011,010.68, and for the year 1928, $500,421,181.06, an increase of $121,410,170.38 this increase having been added to the property since 1921 for the purpose of providing more and better equipment furnishing greater tractive power for locomotives, and increased tonnage capacity for freight cars, reduction in grade line, heavier weight of rail, larger and better type of bridges for purposes of safety and to better serve the public, and reducing the operating expenses of the carrier.

The accounts and records of the company as reflected in its report to the Interstate Commerce Commission in connection with the Act of Congress and the order of the Commission referred to above, indicates that largely as the result of these additional expenditures the company has been enabled to reduce its operating ratio from 83.52% in 1921 to 75.31% in 1928.

During the same period its operating expenses have increased from $91,693,855.71 to $99,091,201.26. This reduction in operating ratio being brought about to a large extent by the ability of the company to carry a greater volume of traffic at lower costs per unit.

[fol. 119] Under the Transportation Act referred to above the Commission has determined that railroad companies' earnings shall not exceed six per cent on the value of its property, and that all earnings in excess of six per cent shall be divided with the Government. In spite of the

large added investment referred to above and the constant efforts being made to improve the service, and reduce the cost, the Missouri Pacific Railroad Company has been unable to earn the six per cent upon its investment which is suggested by Congress and the Commission as a fair rate of return. The return upon its property investment, including material and supplies and cash, for the several years following the passage of the Transportation Act are as follows:

1928	4.09%
1927	3.38%
1926	4.25%
1925	3.86%
1924	3.64%
1923	2.12%
1922	2.04%
1921	2.60%

The increased cost of operation resulting from the Act of the Arkansas Legislature regulating train and switching crews, amounting to $600,000.00 per annum, is equivalent to five per cent interest on a principal of $12,000,000.00, which might be used to much better advantage in the furnishing of additional facilities for the service required by the public. Stated in another manner, if added to the net railway operating income of the carrier for the year 1928, this additional income would have been equivalent to [fol. 120] eleven-hundredths of one per cent upon the property investment of the company.

The $600,000.00 per annum representing the cost of the additional members of the train and switching crews required by the State of Arkansas represents five per cent of the total transportation cost of the company in the state.

If similar laws are passed by other states through which the Missouri Pacific Railroad Company operates involving a like increase in the present expense for transportation service, the total increase in the operating expenses of the company for the year 1928 would have been $2,268,326.44, which is equivalent to forty-three hundredths of one per cent of the total value of the property of the company for that year.

There can be no question but that the rate of return established by Congress and the Interstate Commerce Commis-

sion for companies engaged in the transportation of freight and passengers has been conservatively stated, and unless the carriers are enabled to earn at least that rate of return upon the investment in their property the service to the public will be hampered and the ability to secure the additional capital necessary to furnish all improvements and extensions required will be seriously curtailed.

There can be no question but what every effort has been made in the past several years to improve the service and eliminate unnecessary expense wherever possible. There are only two ways by which this can be accomplished.

First. Is by the plan now in effect of eliminating all unnecessary expenses.

Second. An increase in freight and passenger rates.

It is apparent from the records that the company has not earned a reasonable return upon its property established by Congress.

[fol. 121] It is apparent from the records that considerable success has been attained in eliminating unnecessary expenses, and it is also a fact that there is still to be spent large sums of money in order to continue the improvement program necessary for the safety and proper and efficient management of the property and the affording of proper facilities and service by the company, and this cannot be done when state regulations require the expenditure of large sums which do not contribute to safe, efficient, economical or satisfactory service, or increased volume of traffic handled.

Unnecessary employment of railroad employes is not only inefficient and inexcusable, but an injustice to the employes themselves, in that it creates by an Act of the Legislature nonproductive employment that does not result in permanent benefit to the individual. It prevents them from exercising their rights to permanent employment in positions where their advancement will be assured, and where they will have a reasonable opportunity to permanent prosperity. It encourages the passage of similar laws in other states with a multiplication of the useless expenditure of funds which bring no permanent benefit to the transportation service, and prevents the officers of the

company from exercising their best judgment in the operation of the properties entrusted to their care.

F. P. Johnson.

Subscribed and sworn to before me this 22nd day of October, A. D. 1929. My commission expires Sept. 29, 1931. F. J. C. Sattell, Notary Public within and for the City of St. Louis, State of Missouri. (Notarial Seal.)

[fol. 122] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. G. KOCH—Filed Nov. 22, 1929

STATE OF ARKANSAS,
County of Sebastian, ss:

W. G. Koch, being first duly sworn, deposes and says:

I am Superintendent of the Fort Smith and Western Railway Company, and as such have supervision over the Operating Department of said Railway Company. My headquarters are in the City of Fort Smith, State of Arkansas.

The Fort Smith & Western Railway Company owns a line of railroad extending from Coal Creek, in Le Flore County, Oklahoma, in a general Westerly direction to Guthrie, Oklahoma, but it operates trains, both freight and passenger, from Fort Smith, Arkansas, to Guthrie, Oklahoma, and to Oklahoma City, Oklahoma, using the Kansas City Southern tracks from Coal Creek, Oklahoma, to Fort Smith, Arkansas, and at Fort Smith, Arkansas, it owns about one mile of main line track, together with its terminals in said city. Said Company operates over the Missouri, Kansas & Texas Railroad from Fallis, Oklahoma, to Oklahoma City, Oklahoma.

Qualifications

I have had forty-six years of railroad experience. During that time I have been telegraph operator, train dispatcher, chief train dispatcher, trainmaster, assistant superintendent, and superintendent of the Missouri-Kan-

sas-Texas Railroad, St. Louis-San Francisco Railway and the Fort Smith & Western Railroad Company. I have been [fol. 123] chief dispatcher and superintendent of the Fort Smith & Western Railway Company for the past thirteen years, and I am entirely familiar with the effect of the Arkansas Full Crew Laws as applied to the trains of the Fort Smith and Western Railway Company.

Full-crew Laws

The law in Arkansas requires a crew of not less than three brakemen on freight trains consisting of twenty-five cars or over. All of the freight trains operated by the Fort Smith & Western Railroad Company in and out of Fort Smith, Arkansas, do not contain twenty-five cars, but the great majority of freight trains operated by said company do contain twenty-five cars or more, and said company for all such trains is required to use the third brakeman under the Arkansas law.

We have one freight train in and one freight train out of Fort Smith every day, and the service performed by the third brakeman on freight trains at Fort Smith is as follows:

Inbound trains: Except on Sunday his principal duty is to open the switch and head the train into the yard. This is the switch at the junction of the Kansas City Southern and the Fort Smith & Western Railroads in Fort Smith, and is located between one-fourth and one-half mile from the Arkansas-Oklahoma State line. Except on rare occasions the third brakeman does not get on trains at all, since he performs no duty ordinarily which requires him to get on the train, his chief duty being to open and close the switch, as stated above, which could be performed by either [fol. 124] one of the other two brakemen without any inconvenience.

Outbound trains: With respect to outbound trains the third brakeman required by the Arkansas law performs the same duty as is performed by him on inbound trains—he accompanies the train to the switch described above, and then he opens and closes the switch, which service could be easily performed by the remainder of the crew without inconvenience or trouble.

The necessity of complying with the law requires this third brakeman and the service performed by him is of no value to the railroad company, and prevents the operation of the railroad upon the most economical basis, as the amount paid to this extra brakeman is a useless and unnecessary expense.

This brakeman is only on duty thirty or forty minutes during the day, yet to comply with the law it is necessary to pay him a full day's wages, as he receives pay for eight hours, when it only requires thirty or forty minutes to comply with the law.

In cases where an inbound train reaches the State line within thirteen hours of the outbound train the third brakeman is supposed to meet the inbound train and then he receives pay on the basis of thirteen hours, and he gets paid for eight hours straight time and five hours time and a half. If the inbound train does not arrive at the State line within thirteen hours after the outbound train, then the third brakeman required under the Arkansas law receives pay at the rate of two days of eight hours each—which is one day's pay for each train.

[fol. 125] There can be no justification found in the economical administration of a railroad for this useless and unnecessary expense.

Switch-engine Crew

Our switching business is very light, requiring only one engine and one crew to do the work here, and the third man is required by law on this engine and is absolutely unnecessary and a useless expense, because the work is light and they don't handle a large number of cars at one time, and the three other men on the crew could very easily do the work safely and efficiently.

The crew shifts the cars around and puts them at the freight house when this train comes in on week days when the yard engine is on duty, and delivers cars going to the Missouri Pacific Railroad, the Kansas City Southern, Frisco, and Midland Valley. They set cars to industries on our line. Due to the fact that there are only a few industries located on the Fort Smith & Western tracks, the number of cars handled by the yard crew is small, and it

frequently occurs that there are four men on one car to be delivered to an industry located upon our line, when as a matter of fact the foreman and two men could easily perform the same service.

W. G. Koch.

Subscribed and sworn to before me this 26th day of October, 1929. Ora Stuart, Notary Public. My commission expires 7-21-32. (Seal.)

[fol. 126] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF C. F. LARSON—Filed Nov. 18, 1929

STATE OF MISSOURI,
City of St. Louis, ss;

C. F. Larson, being first duly sworn, deposes and says that he is, and for the past four years has been, Superintendent of Safety upon the Missouri Pacific Railroad Company, with headquarters at the City of St. Louis, Missouri; that he makes this affidavit for use in a suit filed in the District Court of the United States for the Western District of Arkansas, by the Missouri Pacific Railroad Company, to test the validity and restrain the enforcement of the statutes of the State of Arkansas, commonly known as the Arkansas Extra Switchmen and the Arkansas Extra Brakemen Laws, which prohibit, under penalty, the operation of switch engines in the State of Arkansas without the extra switchmen provided for in said law and the operation of freight trains without the employment of the extra brakemen required by said law; and affiant further says:

Qualifications

That affiant has been in the service of railroads in the United States in the Safety First and Claim Department of the Illinois Central Railroad and located at various points upon the Southern lines of said company, especially at McComb, Mississippi; that since October 15, 1913, he has been in the Claim Department and Superintendent of Safety of the Missouri Pacific Railroad Company; that

during all of this period he has specialized in various studies upon the cause of accidents to employes, passengers and outsiders upon the railroad, and made various investigations and studies in order to minimize the cause and [fol. 127] effects of such accidents and personal injuries to railroad employes.

Effect of Arkansas Extra Brakemen and Extra Switchmen Laws Upon Accidents

That from affiant's personal experience in claim and claim prevention work upon railroads, and his experience and investigation of conditions in the safety work upon the Missouri Pacific Railroad, affiant has reached the conclusion that the Extra Switchmen Law and Extra Brakemen Law of the State of Arkansas do not have the effect of minimizing accidents and personal injuries to employes and others upon the Railroads of Arkansas, but, on the contrary, that such acts have the effect of augmenting and increasing the risks and hazards of the service, and the consequent personal injuries of employes engaged in the operation of switch engines and freight trains in the State of Arkansas.

Comparison of Personal Injuries to Train and Engine Men in Arkansas and Other States

With a view of ascertaining the relative number of personal injuries to men employed in engine and freight train service in the State of Arkansas, as compared with other comparable divisions of the Missouri Pacific Railroad where extra switchmen and extra brakemen laws do not obtain, affiant has made a list of the reportable personal injuries to train service employes for the year 1928, giving the number of engine, train and yard men employed by petitioner on the Arkansas Division, Eastern Division, and Omaha Division of said Railroad, and the monthly average of men employed and the per cent of injuries to men employed, with the following results:

[fol. 128] Reportable Personal Injuries—Train Service Employes—Year 1928

Class	Arkansas Division		Eastern Division		Omaha Division	
	No. men employed	No. of injuries	No. men employed	No. of injuries	No. men employed	No. of injuries
Engineers	413	24	330	21	175	2
Trainmen	477	44	418	32	344	5
Yardmen	228	46	47	4	117	10
Total	1118	114	795	57	636	17
Average Injuries Monthly		9.5		4.7		1.6
Percent of Injuries to Men Employed		10.11		7.17		2.67

[fol. 129] That as evidenced by the above statement, the per cent of injuries to men employed upon the Arkansas Division of the Missouri Pacific Railroad Company for the year 1928 was 10.11; that the per cent of injuries to men employed upon the Eastern Division was 7.17; while the per cent of injuries to men employed upon the Omaha Division for the same period was 2.67.

That affiant selected the Eastern Division and the Omaha Division of the Missouri Pacific Railroad Company for the purpose of comparing the same with the Arkansas Division because of the fact that said Eastern Division of the Missouri Pacific Railroad Company, extending from St. Louis to Kansas City, Missouri, is the busiest single track railroad division upon the Missouri Pacific Lines, while the Omaha Division is served by the heaviest power and fastest freight trains, on account of the keen competition with other railroads between Omaha and Kansas City, of any division of the Missouri Pacific upon the Western Division, and, in the opinion of affiant, the Eastern Division and the Omaha Division furnish the best measures of comparison with the Arkansas Division that there is upon the petitioner's railroad.

Conclusion

That the only factor, in the opinion of affiant, which could increase the personal injuries to the men employed upon the Arkansas Division which does not obtain upon the Eastern Division and the Omaha Division of said Railroad, results from the Extra Switchmen and Extra Brakemen Laws of the State of Arkansas, and the consequent employment of one-third more men in that class of service, subject to the [fol. 130] hazards of the dangerous employment in which they are engaged; that the State of Arkansas is the only one of the eight states through which the Missouri Pacific operates where extra brakemen and extra switchmen laws obtain, and from affiant's experience and study of personal injury reportable accidents to employes upon the entire railroad property of the Missouri Pacific, the per cent of injuries to men employed in switching and freight train service is greater in the State of Arkansas than upon any division of the Missouri Pacific Railroad in any of the states through which it operates; that ever since affiant has

been Superintendent of Safety, the average number of switchmen injured per month in the State of Arkansas, upon such terminals as Little Rock and Texarkana, has been greater, considering the number of men employed, than upon either the Kansas City or St. Louis terminals, where a much greater volume of business is handled and a greater number of men employed in such service.

Wherefore, it is the opinion of affiant that the extra switchmen and extra brakemen laws of the State of Arkansas do not have the effect of minimizing or decreasing the number of personal injuries to men employed upon the railroads of said state, but, on the contrary, that such laws have the direct effect of increasing the injuries to men employed in the switching and freight train service upon the railroads in said state.

C. F. Larson.

Subscribed and sworn to before me this 25th day of October, 1929. My commission expires February 28, 1931. W. Jenkins, Notary Public. (Seal.)

[fol. 131] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF D. O. OUELLET—Filed Nov. 18, 1929

STATE OF MISSOURI,
City of St. Louis, ss:

D. O. Ouellet, being duly sworn, on his oath states:

Qualifications

He is General Superintendent of Transportation for the Missouri Pacific Railroad Company and has been so employed by said Railroad Company since February 1, 1926, and that prior to that date, since December 1, 1924, he was Superintendent of Transportation and prior thereto, since January 14, 1907, he was employed by the Missouri Pacific Railroad Company in the capacities of Dispatcher, Chief Dispatcher, Trainmaster, Special Assistant to Superintendent of Transportation, and Superintendent, on the present Arkansas, Central, Louisiana, Memphis and Little Rock Divisions, a portion or all of which territories are located

in the State of Arkansas, where the present Arkansas extra switchman and Arkansas extra brakeman laws obtain which prohibit, under penalty, the operation of switch engines and freight trains in the State of Arkansas without the employment of the third switchman and third brakeman required by said laws, and in addition, Trainmaster and Superintendent on the Eastern, Central Kansas and Colorado Divisions, located in the States of Missouri, Kansas and Colorado, where such laws are not in effect. Affiant further states that in his experience as Trainmaster, Division Superintendent, Superintendent of Transportation and General Superintendent of Transportation, he has had charge of and supervision over operation of trains on said Railroad and [fol. 132] the direction of and responsibility for train and switch crews and has had occasion to study and observe the effect of the laws regulating the number of men required in train crews and switch crews, and more particularly the statutes of the State of Arkansas with respect thereto.

Location of Petitioner's Road

Affiant further states that the railroad of the Missouri Pacific Railroad Company operates into or through the following states: Illinois, Missouri, Oklahoma, Arkansas, Louisiana, Kansas, Nebraska, Colorado, a total mileage of 7,103.50; that it is divided into three general operating districts which comprise a total of eighteen operating divisions; all of or portions of the following operating divisions are located within the boundaries of the State of Arkansas and are affected by these laws: Arkansas Division, Central Division, Little Rock Division, Memphis Division, Louisiana Division, Illinois Division, White River [fol. 133] Division; that said Railroad enters the State of Arkansas at or near the following points: Cricket, Ark., Moark, Ark., St. Francis, Ark., Greenwood Jct., Okla., Texarkana, Ark., Felsenthal, Ark., Vaughn, La., Wilmot, Ark., Readland, Ark., Bridge Jct., Ark., and extends through or beyond the State between the points mentioned, a total of approximately 2,640 miles in Arkansas, to the intersection of: Illinois, Missouri, Oklahoma, Texas, Louisiana, Mississippi, Tennessee state lines. Affiant further states that due to the fact there are no adequate living facilities at points where said railroad crosses the Arkansas state line, nor

places at said state line where accommodations can be secured by the extra brakeman if laid off at the state line, as result of said Arkansas Statutory Crew Laws, said Railroad Company has been compelled to carry an additional brakeman on each of its freight trains operated

between state line and Poplar Bluff, Mo., approximately 19 miles;
between state line and Monroe, La., approximately 47 miles;
[fol. 134] between state line and Lake Providence, La., approximately 15 miles;
between state line and Oak Grove, La., approximately 11 miles;
between state line and Collinston, La., approximately 24 miles;
between state line and Greenwood Jct., Okla., approximately 4 miles:
between state line and Ft. Smith, Ark., approximately 4 miles;
between state line and Malden, Mo., approximately 12 miles;
between state line and Cotter, Ark., approximately 42 miles.

These third brakemen are paid actual miles when in excess of 100 miles; a minimum of 100 miles for each trip; overtime after eight hours, and in event relieved before arrival at a terminal, are paid on the basis of continuous time until their arrival at starting point, earning from $147.80 to $185.30 per month, compared with $190.00 to $224.30 per month earned by other brakemen in same territory.

Cost of Complying with Arkansas Laws

Affiant further states that as result of the Arkansas State Law requiring the use of third brakeman and Arkansas State Law requiring the use of third switchman, said Railroad Company has expended for additional extra switchmen end additional extra brakemen solely by reason of the Arkansas Statutory Crew Laws, and not by reason of any requirements of said Railroad Company, either for safety or convenience in operation, or otherwise, than solely

to comply with said statutes, the sum of approximately $600,000.00 per annum.

[fol. 135] Arkansas Laws Do Not Contribute to Safety

Affiant further states that during the year 1928, comparative figures as to reportable personal injuries to train service employees for the Arkansas Division, where the density of traffic is heaviest of any division in Arkansas, was 10.11% of injuries to men employed, while on the Eastern Division, situated wholly within the State of Missouri, was only 7.17% of injuries to men employed and on the Omaha Division, situated within the states of Nebraska and Kansas, was 2.67% and the density of traffic on the latter two divisions is equally as heavy or heavier than on the Arkansas Division.

Federal Rules as to Power Brakes and Safety

Affiant further states that since the passage of the Arkansas Statutory Crew Laws, the Interstate Commerce Commission has increased the percentage of the cars that must be equipped with power brakes from 50 per cent of the cars in a train to 100 per cent of the cars in each train; and that now all cars and all trains operated over said Railroad are equipped with air brakes and automatic couplers which are kept operative and in good condition, and there is a constant inspection of said air brakes and couplers by the Railroad Company and frequent inspections by representatives of the Interstate Commerce Commission. Affiant further states that during his connection with the Missouri Pacific Railroad Company, particularly in the capacities of Trainmaster and Superintendent, he has had occasion to investigate the causes of accidents [fol. 136] resulting from train operation; that these investigations have been made with a view to preventing the recurrence of avoidable accidents and eliminating unnecessary hazards of operation and seeing that disciplinary measures are administered where injuries or loss have been occasioned by negligence or carelessness; that the number of such accidents varies from year to year, and also varies on the different districts without any regard to or without being affected by the number of brakemen

in road crews or the number of switchmen in switch crews or the number of cars per train, except that the greater the number of men employed on each crew, the greater number there are of such employees liable to accident, regardless of the number of cars per train.

Conclusion

Affiant further states that on freight trains carrying three brakemen it is customary for one, called the forward brakeman, to ride on the engine and for one, called the rear brakeman, to ride in the caboose with the conductor; that the third brakeman also rides in the caboose with conductor and rear brakeman because there is no practical need for the third brakeman on a through freight train; that in the opinion of this affiant neither the extra brakeman nor the extra switchman required by the said Arkansas statute are necessary or desirable, and they do not contribute to the safety of employees or the public, or efficiency in the operation of trains nor do they reduce or minimize the injuries to persons; on the contrary, as stated above, by reason of the increased number of unnecessary [fol. 137] employees on and about the cars and trains as result of these extra men being employed, it is conducive to increasing the number of personal injuries.

D. O. Ouellet.

Subscribed and sworn to before me this 25th day of October, 1929. My commission expires 28th day of February, 1931. W. Jenkins,, Notary Public. (Seal.)

[fol. 138] In United States District Court

[Title omitted]

Affidavit of Frank Aldrich

State of Missouri,
City of St. Louis, ss:

Frank Aldrich, being first duly sworn, deposes and says that he is, and has been since November 1, 1917, General

Chairman of the Brotherhood of Railroad Trainmen on Missouri Pacific lines, representing train and yardmen, with headquarters at Atchison, Kansas, and that he makes this affidavit for use in the suit filed by the Missouri Pacific Railroad Company seeking to restrain the enforcement of the statutes of Arkansas commonly known as the Full Crew Freight Train and Switching Crew Laws and affiant further says:

Qualifications

That he has had twenty-nine years' experience in connection with railway operation as follows:

In 1900 he entered the service as yard clerk and weighmaster, transferring to train service as brakeman January 11, 1904, promoted to conductor January 8, 1910, and since November 1, 1917, has been general chairman for the Brotherhood of Railroad Trainmen, representing the men in train and yard service.

[fol. 139] Services Performed by Third Brakeman and Switchman

I am familiar with the operation of the Full Crew Laws of Arkansas, the duties and services rendered by the third brakeman on trains of twenty-five cars or more, and with the duties and services performed by switchengine crews operating over crossings in cities in compliance with the Full Crew Switchengine Law of Arkansas.

There are cities in the State of Arkansas that prohibit blowing or sounding of locomotive whistles within the city limits; thereby necessitating the movement of trains and cars by hand or lantern signals entirely, and in some of these towns, because of industrial plants being built close to the track, and of curves in the track, it is impossible to transfer signals more than twelve or fifteen cars distance and the third brakeman renders very important and valuable service while doing the switching at these and other places in transferring signals; thereby speeding up the work to be done, and in protecting the public on public highways and crossings and street crossings, preventing accidents and damage to persons and property.

Crews termed as through freight crews, on many trips consume from two to three hours switching at intermediate

points, and often this switching is done in cities, over public crossings where traffic is very heavy, and the third brakeman performs a valuble service to the public in preventing accidents by warning the public of the approaching cars and danger.

I here quote Rule No. 103 of the Missouri Pacific Transportation Rules, revised and in effect as of September 1, 1929:

"When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the leading car, and when shifting over public crossings at grade, not protected by a watchman or gates, a member of the crew must protect the crossing."

There is now pending negotiation a request to the railroads of the United States by the Four Railroad Brotherhoods that men be furnished sufficient in number to comply with the above operating rules of the railroad companies.

[fol. 140] The brakemen are required by their Rule No. 888, reading as follows:

"Conductors must inspect and require their men to inspect the running gears and brake and draft rigging of trains as often as practicable while on the road, remedy so far as possible any defects, discovered, and remove from the train cars which are unsafe to run. Special attention must be paid to hot journals."

When a long train pulls into a sidetrack, or for some reason stops on the main line, this swing or middle brakeman gives to the public quick service by immediately cutting the public crossing, saving time and inconvenience to the public, and, after opening the passage at the crossing he statiens himself there to direct traffic across with safety, and stopping and warning them when in danger of moving cars or trains; thereby preventing accidents and damage to property.

In Arkansas there is very often heavy and foggy weather which makes the operation of trains very hazardous, and when it becomes necessary to transfer signals in connection with the movement of the train or crews, he stations

himself in the middle of the train and assists in directing the movement by signals to the head brakeman and the engineer, for often the weather and fog is so dense that signals by hand or ordinary lantern cannot be seen except for a very short distance.

Many emergencies arise, such as pulling out of draw bars, cars derailed, and other accidents, requiring the flagman to go back to protect the rear of his train, and this third brakeman assists in the work of chaining up cars, which is done by a very heavy chain that no man can handle, or assists in righting the wrongs of whatever nature they may be; thereby, aiding in getting the train moving again, saving delay to shippers and to the public.

Duties of Men in Performing Service in Compliance with the Full Crew Switch-engine Law

The third man on the switchengines in the cities assists in transferring signals and, because of the heavy auto traffic over street crossings, they are constantly protecting the public from injury, as there is ten fold greater need here [fol. 141] for the Full Crew Laws of Arkansas to-day than when they were passed because of the extremely heavy and daily increasing auto and truck operations over the public crossings in the cities, and the third helper on the switch engines prevents accidents to person and property daily. The enacting clause of the law states the real necessity for such a law as follows: "An Act for the better protection and safety of the public."

The people of Arkansas evidently desire to keep this law, as is evidenced by the failure of the railroad companies in their attempt to have these laws repealed by the Legislature and, after their legislative failure, they submitted the repeal of the laws to a referendum vote of the people, and the people, by their vote in 1926, refused to let the railroads take away their safety laws and protection to the citizenship of Arkansas.

Conclusion

Trains are two and three times longer to-day, and cars four and five times greater in capacity, than they were in the years of 1907 and 1913 when the Full Crew Laws were

passed, and the automobile traffic is ten fold greater; so, by the longer trains, heavier cars, and more and heavier automobile and truck transportation, likewise, there is more of a necessity for the Full Crew Laws of Arkansas, as a protection to the public, than there was when the laws were passed in the years of 1907 and 1913.

Frank Aldrich.

Subscribed and sworn to, before me, this the 11th day of December, 1929. Justine Wilson, Notary Public within and for the City of St. Louis, State of Missouri. My commission expires Dec. 21, 1932. (Seal.)

[fol. 142] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITION—April 28, 1930

This cause coming on for hearing before a statutory court duly composed of the Honorable Kimbrough Stone, Circuit Judge and the Honorable Thomas C. Munger and the Honorable Charles B. Faris, District Judges, the plaintiff presents its application for a temporary injunction and the defendants present their motion to dismiss the petition and cause.

Having fully heard counsel in argument and carefully considered the pleadings, affidavits and briefs and being fully advised, it is ordered that the motion to dismiss is sustained and the petition and the cause dismissed at the costs of the plaintiff.

Dated this 26th day of April, 1930.

Kimbrough Stone, Circuit Judge. C. B. Faris, District Judge. Thos. C. Munger, District Judge.

[fol. 143] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed May 13, 1930

To the District Court of the United States for the Western District of Arkansas, at Fort Smith; Honorable Charles B. Faris, assigned to act in place of District Judge Youmans:

The Missouri Pacific Railroad Company, the above named plaintiff, conceiving itself aggrieved by the decision of the

Three-Judge Court rendered and entered in the above entitled cause on the 26th day of April, 1930, wherein said court denied the application of plaintiff for a temporary injunction and refused the plaintiff a temporary injunction order restraining the above named defendants, and each of them, from enforcing Sections 8577 and 8579 of Crawford & Moses' Digest of the Statutes of Arkansas for the year 1921, known as the "Arkansas Full Crew Law", and Sections 8583 and 8586 of Crawford & Moses Digest of the Statutes of Arkansas for 1921, known as the "Full Switching Crew Law," governing the operation of freight trains in the State of Arkansas, which decision also sustained the motion of the defendants to dismiss the plaintiff's petition and dismissed the same at the cost of the plaintiff, the said plaintiff does hereby appeal, from said order and decree therein, to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, District of Columbia, under the rules in said court made and provided.

And your petitioner further prays that the proper order, relating to the security to be required of it be made and entered hereon.

Missouri Pacific Railroad Company, by Thos. B. Pryor and Edw. J. White, Its Solicitors.

[fol. 144] In United States District Court

Assignment of Errors—Filed May 13, 1930

The plaintiff in the above cause prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error the action of the Three-Judge Court in this, to-wit:

I

In refusing the temporary injunction and restraining order prayed for by the plaintiff, restraining the defendants

from enforcing the Arkansas Full Train Crew Law (Sections 8577 and 8579, Crawford & Moses' Digest of the Statutes of Arkansas for 1921) and the Arkansas Full Switching Crew Law (Sections 8583 and 8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921), which statutes of said State, attempting to govern the operation and length of freight tra-ns used in interstate commerce, are clearly inconsistent with the entire comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act, as amended by the Transportation Act of 1920 and by the Railroad Labor Act of 1926.

II

That said Full Train Crew and Full Switching Crew Laws of the State of Arkansas, above referred to, are inconsistent with, and in violation of, paragraphs 10 and 21 of Section I of the Act to Regulate Commerce as amended by the Transportation Act of 1920, known as the "Car Service Sections" of the Interstate Commerce Act.

III

Said Acts of the General Assembly of the State of Arkansas are inconsistent with Sections 13, 15 and 15-a of the Interstate Commerce Act, as amended by the Transportation Act of 1920.

IV

Said Acts of the General Assembly of the State of Arkansas are inconsistent with the spirit and intent of the Federal Railroad Labor Act of 1926.

[fol. 145]

V

Said Acts of the General Assembly of the State of Arkansas are in contravention of the Constitution of the United States, especially in the Interstate Commerce Clause of the Constitution of the United States: Section Eight, Article One of said Constitution.

VI

In holding that the Congress of the United States, by the above statutes, had not occupied the field covered by

these state statutes, above referred to, and delegated to the Interstate Commerce Commission complete and full authority over the subject matter attempted to be covered by these said state statutes.

VII

In holding that the decision of the United States Supreme Court in the cases of

C. R. I. & P. Ry. Co. vs. State of Arkansas, 219 U. S. 453, and
St. L. I. M. & S. Ry. Co. vs. State of Arkansas, 240 U. S. 518,

in view of the subsequent legislation by Congress, above referred to, were conclusive upon said court and prevented it from restraining the enforcement of said statutes of the General Assembly of the State of Arkansas.

VIII

In holding that Congress had not used "fairly clear language" in the amendments to the Transportation Act above referred to, removing from the States the power to prescribe the length of freight trains used in interstate commerce.

IX

In holding that the Congressional legislation above referred to had not "specifically expressed a grant to the Commission of power to control the number of employes to be used by a carrier in the movement of its trains or cars in interstate commerce", when paragraphs 10 and 21 of Section One of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, clearly and explicitly delegate to the Interstate Commerce Commission the power to prescribe "safe and adequate car service", which is expressly defined by paragraph 21 of Section One and paragraph 10 of Section One of the Act to Regulate [fol. 146] Commerce to require and regulate the "safe and adequate supply of trains by any carrier by railroad subject to this Act".

X

In holding that the word "practice" was so vague and indefinite, as thiw term was used in the Transportation Act

of 1920, Sections 13, 15, and 15-a, that the Interstate Commerce Commission had not been fully empowered to stop such practice, required by the General Assembly of the State of Arkansas, above referred to, which resulted in such excessive expenditure of carrier funds without corresponding benefit and, hence, was "a regulation or practice, made or imposed by authority of any State", which was inconsistent with the power delegated by Congress to the Interstate Commerce Commission.

XI

In holding that the revealed purpose of these subdivisions is to prevent "discriminations favorable to intrastate commerce at the expense, and to the detriment, of interstate commerce" only as to rates, when the annual expenditure of $600,000.00, which these laws of the State of Arkansas compel the plaintiff to expend without any corresponding benefit, was clearly the result of "regulations and practices" of a State, inconsistent with the general scheme and object to be attained by the Transportation Act of 1920.

XII

In holding that the words "practice" and "practices", as used in the Transportation Act, "are, when given their broadest permissible meaning, confined to such as are originated by the carrier", when the general scheme and purpose of the Transportation Act were intended to prevent such discriminations against interstate commerce and such wholesale expenditures as those imposed by these Acts of the General Assembly of the State of Arkansas, which are clearly unreasonable and uneconomical and imposed a "practice" in violation of the spirit and intent of the Transportation Act.

[fol. 147]

XIII

In holding that, by the Transportation Act, Congress had not conferred upon the Interstate Commerce Commission "the power to supervise carrier expenditures,—at least, to the extent of preventing waste or improvidence", and "to uphold such power in the Interstate Commerce

Commission would be a decided step in advance of any congressional action."

XIV

In holding that the sections of the Transportation Act above referred to confer upon the Interstate Commerce Commission "no power of directly supervising carrier expenditures", and that said sections of the Transportation Act are "clearly aimed only at voluntary expenditures by the carrier" and do not apply to such unreasonable and extravagant expenditures exacted by individual states, which have a tendency to, and clearly do, break down the national transportation agencies intended to function, as a whole, for the benefit of the public.

XV

In holding that the purpose and intent of the congressional Labor Act of 1926 was only "to prevent interruption of interstate commerce by strikes and lockouts", when the Railroad Labor Act clearly includes a medium and machinery for the peaceful and orderly settlement of disputes involving "conditions of employment" and "working conditions", which are the subject of agreement between the carriers and their employees, which is the whole subject matter of the said Acts of the General Assembly of the State of Arkansas complained of in the plaintiff's bill.

XVI

In concluding that the plaintiff's petition stated no cause of action and, for that reason, dismissing the cause at the cost of the plaintiff.

XVII

In refusing the plaintiff a temporary injunction to prevent the enforcement of the illegal statutes complained of [fol. 148] in the plaintiff's bill.

Wherefore the said plaintiff prays that said errors, so assigned, may be corrected and for a reversal of the decree

of the three judge court sitting in said cause for the United States District Court for the Western District of Arkansas, in the above entitled cause.

Thos. B. Pryor and Edw. J. White, Solicitors for Plaintiff.

[fol. 149] In United States District Court

Order Allowing Appeal—May 13, 1930

The appellant in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled case by the District Court of the United States for the Western District of Arkansas on the 26th day of April, 1930, refusing the plaintiff an injunction and dismissing the plaintiff's petition, and said appellant having presented and filed its petition for appeal, assignment of errors, and prayed for a reversal, pursuant to the statutes and rules of the Supreme Court of the United States made and provided;

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the Western District of Arkansas in this cause, as provided by law; and

It is further ordered that the clerk of the court appealed from shall prepare and certify a transcript of the record, proceedings and decree in this cause, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within — days from this date; and

It is further ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars.

Dated May 13th, 1930.

C. B. Faris, Acting District Judge of the United States District Court for the Western District of Arkansas. Kimbrough Stone, Circuit Judge for the Eighth Judicial Circuit. Thos. C. Munger, District Judge for the State of Nebraska, Acting as a Member of the Three Judge Court, sitting in the Above-entitled Cause.

[fols. 150-153] Bond on appeal for $1,000.00, approved May 13, 1930, and filed May 19, 1930, omitted in printing.

[fol. 154] IN UNITED STATES DISTRICT COURT

Before Stone, Circuit Judge, and Munger and Faris, District Judges

MEMORANDUM OPINION—Filed April 28, 1930

Per CURIAM:

This is a bill seeking to enjoin the Attorney General of the State of Arkansas and the prosecuting attorneys of the Twelfth and Thirteenth Judicial Circuits of that State from prosecuting plaintiff for violation of the "full crew" train (Sections 8577-8579 Crawford & Moses Digest of the Statutes of Arkansas, for 1921) and switching (Sections 8583-8586 of the above Digest) statutes of that State governing operation of freight trains. The bill alleges that these statutes are violative of the Fourteenth Amendment to the Constitution and of the Interstate Commerce Act, as amended by the Transportation Act of 1920.

Defendants have filed a motion to dismiss upon various grounds. To avoid possible further argument and by leave of court, defendants deposited an answer which was to be filed and acted upon in case the court should deny the motion to dismiss. This procedure was agreeable to all parties. Affidavits have been filed. The court has heard argument and briefs have been submitted.

We first consider the motion to dismiss. The first ground of this motion is that this is a suit against a state. This contention is answered by a long line of decisions among which are the following: Old Colony Trust Co. v. Seattle, 271 U. S. 426, 430; Greene v. L. & I. R. R. Co. 244 [fol. 155] U. S. 499, 506; Harrison v. Railroad, 232 U. S. 318, 332; Hopkins v. Clemson Agr. College, 221 U. S. 636, 642; Ex parte Young, 209 U. S. 123, 149; Prout v. Starr, 188 U. S. 537, 543.

The second ground of the motion is that this action is not allowable since it seeks to enjoin the enforcement of criminal statutes and that the bill shows plaintiff has not

availed itself of the "full and complete remedy that it has under the laws of the State governing practice and procedure in its the State's courts". The bill alleges that certain prosecutions have taken place, others are in course and yet other- threatened. Obviously, a property right of plaintiff is involved in the enforcement of these statutes. Where such is the case and where a multiplicity of such prosecutions are involved, a court of equity may intervene even though the effect is to enjoin the enforcement of criminal laws (Yu Cong Eng v. Trinidad, 271 U. S. 500, 507; Traux v. Raich, 239 U. S. 33, 37).

The third ground is that no appeal was taken from the prosecutions which have gone to judgment and that plaintiff should have availed itself of an appeal from the justice of the peace (before whom the judgments were entered) to the State Circuit Court, thence to the State Supreme Court and thence, by writ of error, to the United States Supreme Court. If the violations covered by such judgments were all that were involved in this proceeding, there would be much force in the above suggestion. But where the statutes provide (as here) that "each freight train" so run and each switching "crew" so operated shall be a separate offense, and where the purpose of the bill is to prevent all prosecutions in the future, the inadequacy of the above procedure is evident. While the tedious journey of appeal through three consecutive courts is being travelled, the plaintiff is compelled to submit to the statutes and undergo losses it can never recover.

The remaining grounds of the motion go to the sufficiency of the bill to state a cause for relief and may be treated together. The first ground for relief alleged in the bill is a violation of the Fourteenth Amendment. De-
[fol. 156] fendants' claim as to this is advanced in the motion to dismiss and is that the validity of these two statutes has been sustained. That position is well taken. This statute as to the full train crew was before the Supreme Court of Arkansas (Chicago, Rock Island & Pac. Ry. Co. v. State, 86 Ark. 412) and passed, by writ of error, to the Supreme Court of the United States (219 U. S. 453). Its validity was sustained in both courts. This full switching crew statute was before the State court (St. L. I. M. & S. Ry. Co. v. State, 114 Ark. 486) and passed,

by writ of error, to the Supreme Court of the United States (240 U. S. 518), being sustained in both courts.

The second ground of the bill is that Congress has occupied this field since the above decisions (the latest being in 1916). In the train crew decision (219 U. S. 453, at 466), the court said:

"Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect of the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within the jurisdiction, must control."

Therefore, the question here is not as to the power of Congress, exclusively to occupy the field covered by these State statutes but it is whether it has, in fact, done so. The bill alleges that such statutes "would defeat the general and comprehensive scheme of Federal regulation prescribed by (a) the Interstate Commerce Act, as amended by the Transportation Act of 1920, and (b) by the Railroad Labor Act of 1926". The bill then proceeds to particularize, as follows:

"XI

Conflict with Interstate Commerce Act, as Amended

Section 13 of the Act to Regulate Commerce, as amended February 28, 1920, gives the Interstate Commerce Commission complete jurisdiction to prescribe 'the rate, fare, charge, classification, regulation, or practice,' which must be adopted and put into effect by interstate carriers, and the Interstate Commerce Commission is given authority by Congress, after hearing, to fix and determine 'any such rate, fare, charge, classification, regulation, or practice which may cause an undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate

or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, and to prescribe the rate, fare, charge, classification, regulation, or practice thereafter to be observed in such manner as, in its judgment, will remove [fol. 157] such advantage, prefference, prejudice, or discrimination, * * * the law of any state or the decision or order of any state authority to the contrary notwithstanding.'

This section of the Transportation Act, which was not in existence when the constitutionality of the Arkansas Full Switching Law and Extra Brakeman Act were passed upon by the Supreme Court of the United States, clearly shows that Congress, since those decisions, has occupied the field, thus nullifying the state power upon this subject.

By Section 15 of the Act to Regulate Commerce, as amended February 28, 1920, the Interstate Commerce Commission is given complete authority to determine rates, classifications, regulations and practices, and the Commission is given authority to prescribe what will be 'a just and reasonable rate, fare, charge, thereafter to be observed,' and what 'individual or joint classification, regulation or practice is or will be just, fair and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist * * * and the carriers shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.'

The Interstate Commerce Commission, by section 15, paragraph 6, in prescribing the rates and practices to be followed by interstate carriers, is directed by Congress as follows:

'In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operating, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers, and also whether any particular par-

ticipating carrier is an originating, intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier to the joint rate, fare or charge.'

Section 15 (a), paragraph 2, further provides as follows:

'In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole, or as a whole in each of such rate groups, will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structure and equipment, earn and aggregate net annual operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property,' etc.

By these sections the Commission is given authority, not only to fix the rates so as to provide a reasonable return upon the property, but also to regulate the expenditures consistent with proper, efficient operation and economical management. If the Interstate Commerce Commission has authority to prescribe the rates and to regulate the expenditures, then the State of Arkansas, or any other individual state, cannot uselessly require, under the guise of the police power, an annual expenditure by the carriers of this state of the sum of $1,000,000.00, which is not required by any other of the eight states through which the petitioner operates, for compliance with the so-called Full Crew Laws.

XII

Conflict with Railroad Labor Act

Congress has also legislated upon the complete subject of railway labor by providing for a board of mediation and an emergency board, if necessary, to consider and act upon all disputes and issues between railroad employees and the common carriers of this country that they do not settle themselves.

[fol. 158] The Railroad Labor Act of 1926 provides that it shall be the duty of all carriers, their officers, agents

and employees; to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes. Conferences are provided for 'in case of a dispute between a carrier and its employes arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions.'

Congress, by the Railroad Labor Act, has given the United States Board of Mediation jurisdiction to consider and act upon any and all disputes, and not only to consider reasonable rules and working conditions, but also, when arbitration is had, the decision of the arbitrators as to proper 'working conditions' between railroad employees and common carriers is binding between both parties.

Plaintiff avers that by said Railroad Labor Act Congress intended to leave the railroad common carriers of the United States and their employees free to handle questions pertaining to rules and working conditions, as in said Railroad Labor Act provided, and intended that if they agreed to arbitrate under said act any controversies or disputes with respect to rules and working conditions, the judgment of the Arbitrators should not be limited in any way other than by federal statutes, and intended that any judgments on awards entered pursuant to provisions of said act should not be affected or disturbed in any way by any state statute or any order of any state administrative body theretofore or thereafter passed or entered. The Arkansas Extra Switchman Act and Extra Brakeman Law is therefore void because in conflict and inconsistent with the said United States Railroad Labor Act of 1926."

The rule seems to require clear language to accomplish the results here sought, for it is said in Napier v. Atlantic Coast Line R. R. Co. 272 U. S. 605, 611, "The intention of Congress to exclude States from exerting their police power must be clearly manifested, Reid v. Colorado, 187 U. S. 137, 148; Savage v. Jones, 225 U. S. 501, 533." In the light of this rule, do the several matters included in the above contentions of plaintiff, or any one of them, make clearly manifest any intention of Congress to abrogate the power of a sovereign state to exercise its police power in the matter of requiring extra brakemen and extra switchmen?

The Transportation Act of 1920 (41 Stat. 456) "introduced into the federal legislation a new railroad policy" (New England Divisions Case, 261 U. S. 184, 189; R. R. Comm. v. C. B. & Q. R. R. Co. 257 U. S. 563, 585.) The purpose of this policy is repeatedly expressed in the Act (Sections 402, 407, 422), and may be stated in the language used in section 402 as being to 'best promote the service in the interest of the public and the commerce of the people.' An important feature of the means to accomplish [fol. 159] such purpose was 'affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country' (Dayton-Goose Creek Ry. Co. v. U. S. 263 U. S. 458, 478) so as 'to insure * * * adequate transportation service' (New England Divisions Case. 261 U. S. 184, 189)" M. K. & T. R. Co. v. Northern Okla. Rys. 25 Fed. (2d) 689, 690, this court.

While the Act declared this ambitious purpose and the construing decisions have recognized and striven to give full effect thereto, yet the Act did not grant any "blanket" authority to the Commission to effectuate such purpose. On the contrary, Congress specified the character of matters committed to the Commission. It appeared, in the argument, that a respectable number of the States had (and yet have) legislation directly upon the matters here involved and the validity of such legislation had been established (C. R. I. & P. R. R. Co. v. Arkansas, 219 U. S. 453; St. L. I. & S. R. R. Co. v. Arkansas, 240 U. S. 518) at the time this Act was under consideration by Congress. We should, therefore, expect that Congress would use fairly clear language if it intended to take that field away from the states. Nowhere in that Act is there a specifically expressed grant to the Commission of power to control the number of employees to be used by a carrier in the movement of its trains or cars in interstate commerce. If such a grant is in the Act, it must be construed to lie within some more general expressions. Plaintiff points out such expressions which it contends should be so construed. Those are found in that part of the Act which amended the then existing Interstate Commerce Act (as amended).

One expression relied upon is the word "practice". This word, standing alone, is vague. It has been defined as "Frequent and repeated exercise in any matter" (Stand-

ard Dictionary). Its outline becomes definite only when associated with other definite ideas. Even as associated with the jurisdiction of the Interstate Commerce Commission, as expressed in the Act to Regulate Commerce as amended in 1910, the Supreme Court has said of the word, "Regarding only its broad generality anything may be asserted of it" (U. S. v. Penn. R. R. Co. 242 U. S. 208, 228) [fol. 160] and "considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do" (B. & O. R. R. Co. v. U. S. 227 U. S. 291, 299). Mr. Justice Butler then declares the rule, for construing this word when used in the Commerce Act, to be that "Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it" (B. & O. R. R. Co. v. U. S. 277 U. S. 291, 300).

As originally enacted the Interstate Commerce Act (Act to Regulate Commerce, Feb. 4, 1887, 24 Stat. 379) did not contain the words "Practice" or "practices." Prior to the Transportation Act of 1920, those words came in, by amendments to that Act, only in sections 1 and 15. Section 15 was so amended by the Acts of June 29, 1906 (34 Stat. 584, 589) and of June 18, 1910 (36 Stat. 539, 545) and of May 29, 1917 (40 Stat. 101). In the Transportation Act the expression appears in amendments to section 1 (41 Stat. 456 at 475 and 476), to section 13 (41 Stat. 456 to 484), to section 15 (41 Stat. 456, at 485, 486, and 487) and in the new section 15 a. (41 Stat. 456 at 488.)

Plaintiff mainly relies upon the use of the expression in sections 13, 15 and 15a of the Transportation Act although the use in Section 1 was adverted to in argument. We will take the sections up in the order: 13, 15, 15a and 1.

Section 13 deals with complaints to and investigations by the Commission. Up to the Transportation Act, it consisted of two unnumbered subdivisions. The Transportation Act (41 Stat. 456, 484) gave those subdivisions numbers (1) and (2) and added thereto two new subdivisions (3) and (4). Before the Transportation Act, there had been but one Act (June 18, 1910, 36 Stat. 539, 550) amending this section. The amendment of 1910 was confined to adding "any common carrier" as a complainant and to clarify-

ing the statement as to the right and powers of the Com- [fol. 161] mission to initiate investigations. The expressions theretofore used are the same now found in subdivisions (1) and (2), wherein the Commission is empowered to determine complaints "of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof" or to initiate investigations "as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act" (36 Stat. 539, 550-551). The word "practice" did not appear in the section prior to the Transportation Act and, therein, only in subdivisions (3) and (4) which were new in that Act. Those two new subdivisions (italics ours) are as follows (41 Stat. 484):

"(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or *practice*, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and *practices* of carriers subject to the jurisdiction of such state bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the rate making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facili-

ties of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or *practice* causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or *practice* thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and *practices* shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

[fol. 162] The scope and purposes of these two subdivisions are revealed in the expressions used therein. They are parts of one legislative idea which is to declare unlawful "any rate, fare, charge, classification, regulation or practice, made or imposed by authority of any state, or initiated by the President during the period of Federal control" (subdivision (3) which "causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" (subdivision (4)); and to provide the method of enforcing that prohibition. That method is to lodge jurisdiction in the Commission to make such investigations and orders thereon, which orders shall be controlling. As a matter of comity and fairness, the Commission is required to notify the State affected so that it may be represented at the hearing. As a matter of comity and possible aid to the Commission, it is empowered to confer with and hold joint meetings

with the proper state authorities and to avail itself of the information, etc., of such authorities. Subdivision (4) is really the main one of the two subdivisions, while (3) is largely, if not entirely, procedural. The revealed purpose of these subdivisions is to prevent discriminations favorable to intrastate commerce at the expense and to the detriment of interstate commerce. Such discriminations had arisen before the Transportation Act and had been condemned by the Supreme Court in the "Shreveport Case" (Houston and Texas Ry. Co. v. U. S. 234 U. S. 342) and the Minnesota Rate Cases, 230 U. S. 352. It was to enact in to statutory law and affirm the jurisdiction of the Commission in such matters that these two subdivisions were inserted in the Transportation Act. The matters treated in the above cases were intrastate rates fixed by State authority. The main purpose Congress had in mind was rates or matters affecting rates—classifications, rules, regulations, practices. This is clearly revealed in the report of the Committee to the House of Representatives (66th Cong. H. R. Report 456) where, in discussing this feature of the bill, it was said:

[Vol. 163] "Adjusting Conflicts Between Inter and Intra State Rates

Whenever, in any investigation under the provisions of the Commerce Act, or in any investigation instituted upon petition of the carrier concerned, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any State, the commission (Sec. 445) before proceeding to hear and dispose of such issue shall cause such state or states to be notified of the proceeding. The commission can ask the State regulatory body to 'sit in' with it and hold joint hearings and to avail itself of the cooperation, services, records, and facilities of such State authorities. After such hearing the Commission shall make such findings and orders as may in its judgment tend to remove any undue advantage, preference or prejudice as between persons or localities in State and interstate or foreign commerce. The provision practically enacts into law the decision of the Supreme Court in the so-called 'Shreveport' case. Any

undue burden upon interstate or foreign commerce is forbidden and declared to be unlawful. It is believed that the provisions of this section will have a beneficial and harmonizing effect and will tend to reduce the number of so-called 'Shreveport' cases, while at the same time recognizing the regulatory bodies of the several states." H. Rep. 456 p. 20.

"Control of Commission over intrastate rates.—Section 415 (416) amends section 13 of the commerce act in such a manner as to require the commission when considering the relation between the intrastate rate and the interstate rate to give notice to the state affected. The commission is authorized to confer with the proper State regulatory body and to hold joint hearings. The commission is given power, after full hearing, to make such orders as may in its judgment tend to remove any undue advantage, prejudice, or preference as between persons or localities in State, interstate, or foreign commerce, respectively, or any undue burden upon interstate or foreign commerce." H. Rep. 456, p. 29.

Also see statement of Senator Cummins in explanation of the bill (59 Cong. Rec. 142-143). It may be that the words "regulation, or practice" should not be narrowly confined to such as are directly related to rates but it is certain that Congress had no thought of including matters such as are involved in this action. This is true for two reasons. First, such words are used in connection with others—"rate, fare, charge, classification"—which refer exclusively to rates and, therefore, are to be construed in that connection (B. & O. R. R. Co. v. U. S. 277 U. S. 291, 299, 300). Second, these subdivisions of the section refer only to practices which tend unduly to discriminate in favor of intrastate commerce and against interstate and foreign commerce—here, all commerce is equally affected and in the same manner by these state statutes.

[fol. 164] Plaintiff relies upon the same expression as used in section 15 as amended by section 418 of the Transportation Act (41 Stat. 456, 484-488). That expression first came into this section by the amendment of June 29, 1906 (34 Stat. 584, 589) and further by the amendment of June 18, 1910 (36 Stat. 539, 551). As originally enacted

(24 Stat. 379, 384), this section was a single paragraph and provided for a "cease and desist" or "reparation" order by the Commission. The power there given was one of negation as to "anything * * * done or omitted to be done (by the carrier) in violation of the provisions of this act, or of any law cognizable by said Commission." Besides broadening the power of the Commission in respects not here material, the Act of 1906 amended the existing paragraph of the Act to Regulate Commerce. Instead of the above quoted general language ("anything * * * done or omitted to be done," etc.) the amendment substituted "any of the rates or charges whatsoever, demanded, charged, or collected * * * or any regulations or practices whatsoever of such carrier or carriers affecting such rates * * *"; and gave the Commission power to act affirmatively by determining and prescribing a just rate "and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed." The above is the first appearance of the words "practice" or "practices" in the Interstate Commerce (Act to Regulate Commerce) Act. Obviously, it relates only to voluntary practices by the carrier which improperly affect rates. The amendment of 1910 did not depart from this meaning of the words "practice" or "practices" as used in the section. It speaks of rates and of "classifications, regulations, or practices" which are found to be unjust or unreasonable or unjustly discriminatory or undul, preferential or prejudicial or otherwise in violation of any of the provisions of this Act" (36 Stat. at 551). In the next paragraph (new in the amendment) relating to filing of tarrif-s, etc., the meaning of the words is emphasized. That paragraph starts with "Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any [fol. 165] new individual or joint regulation or practice affecting any rate, fare, or charge" and thereafter uses the word "practice" six times in the same connection. The position of these two paragraphs would seem to indicate that the words were intended to be used in both in reference only to rates. However, the use in the first paragraph, considered alone, is rather broad and the expressions in the report of the Committee to the House of Rep-

resentatives (H. R. Report 923 pp. 10 82-84, 61st Cong. 2nd Sess.) indicate a wider meaning. But even the committee report does not carry the meaning beyond "practices" originated by the carriers. The amendments to this section by the Transportation Act (41 Stat. 456 at 484-488), obviously, do not broaden the meaning of the words as they existed in the section before those amendments.

The word "practices" occurs once in section 15a (41 Stat. 456, 488), which is a new section added by the Transportation Act. The use there occurs in a definition of "rates"; is expressly limited to practices "relating" to "rates, fares, and charges" and plainly, refers only to such as are originated by the carriers.

Counsel, in argument, call attention to the same words in amendments to Section 1 made by the Transportation Act (41 Stat. 456, at 475-476). The amendment there refers to two separate matters. The first occurs in section 400 of the Transportation Act (41 Stat. at 475) and clearly is confined to such as are originated by the carrier in connection with "the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act." The second occurs in section 402 of the Transportation Act and refers solely to "car service."

The conclusion is that the words "practice" or "practices," as used in the Transportation Act, are, when given their broadest permissible meaning, confined to such as are originated by the carrier or such as result in discrimination in favor of intrastate commerce as against interstate or foreign commerce.

Counsel rely, also, upon a provision in the new section, 15a, added by the Transportation Act. This is the "recapture of earnings" section. Subdivision (3) thereof, dealing with the determination by the Commission of the rate of return on value, requires consideration to be given "to [fol. 166] the transportation needs of the country and the necessity (under honest, efficient and economical management of existing facilities) of enlarging such facilities in order to provide * * adequate transportation." The provision stressed here is "economical management." The argument is that the Arkansas statutes require unnecessary and, therefore, wasteful expenditures; that the above provision gives the Commission the power to confine man-

agement to "economical" measures and, therefore, Congress has occupied the field of controlling matters interfering with such economical management. The logical result of this contention, as to grant of power to the Commission, is that Congress conferred the power to supervise carrier expenditures—at least, to the extent of preventing waste or improvidence. The power to do this directly would be a decided step in advance of any congressional action before the Transportation Act. This subdivision of this section deals with just one main subject. That subject is the rate of return on property value to be determined and allowed the carriers by the Commission. As an element in such determination, the transportation needs of the country are to be considered by the Commission. The expression relied upon here occurs only in connection with the consideration of "the necessity * * * of enlarging such (transportation) facilities." In that connection, the Commission is to consider the honesty, efficiency and economy "of existing transportation facilities." Such provision gives no power of directly supervising carrier expenditures. It provides control only through the rate of return allowed by the Commission. Also, it clearly is aimed only at voluntary expenditures by the carrier.

Counsel rely upon certain expressions by Senators Cummins (Cong. Rec. 59, p. 396) and Robinson (same pp. 3331, 3332 and 3334) as sustaining their view. Other expressions show, more clearly, the thought to be that if a carrier, having large net earnings and knowing it could, under [fol. 167] section 15a, retain only a part thereof, should seek to use such exress earnings in exhorbitant wages or other wasteful expenditures, the Commission might make such action inadvisable by considering such in estimating the proper excess earnings to be turned over to the Government as trustee—in short, such could be thrown back on the corporation to the loss of its stockholders. There is no suggestion in the section as enacted, in the committee reports or in the congressional debates of any direct control by the Commission of any expenditures of the carriers and indirect control is suggested only as to such expenditures as are voluntarily made by the carrier.

Labor Act of 1926

Plaintiff contends that Congress has occupied the field of these Arkansas statutes in the Labor Act of 1926 (44 Stat. 577). It is argued that Congress, in that Act, took over control of "working conditions" of employees of interstate carriers and that "working conditions", as there used, includes the number of men required in train and switching crews. In a sense, the number of men required to perform a task is one of the "working conditions" of that task. However, such meaning is not necessarily included in such expression. Therefore, it is necessary to construe this Act to determine if such meaning is to be found therein. This Act is the latest of a line of congressional legislation having the same general purpose. Prior Acts are the Acts of June 1, 1898 (30 Stat. 424) of July 15, 1913 (38 Stat. 103) and the Transportation Act of 1920 (41 Stat. 456, 469). The purpose of each of these Acts was to prevent interruption of interstate commerce by strikes or lock outs resulting from disputes between carriers and their employees. The general method of each of these Acts is to provide a medium or machinery for peaceful, orderly settlement of such disputes. In each the subject matter of dispute is defined in general terms—these terms are similar in all of the Acts. The Acts of 1898 (30 Stat. 424, 425) and of 1913 (38 Stat. 103, 104) include in such definition "conditions of employment." The Transportation Act (41 Stat. 456, 470, 471) includes [fols. 168 & 169] "working conditions" and "standards of working conditions." The Labor Act of 1926 (44 Stat. 577, 578, 580, 582) includes "working conditions." Obviously, these terms in each of these Acts have the same general meaning. They mean such conditions affecting the work of the empolyees as might be the subject of agreement between the carriers and the employees. This could not include matters of statutory duty for such are withdrawn from the volition of either party. Also, if Congress intended to occupy the field in the Labor Act of 1926, it had already, by the use of similar language, done so in 1898, yet the Supreme Court, in 1911 (219 U. S. 453) and 1916 (240 U. S. 518) decided these very statutes of Arkansas were in a field not occupied by national legislation.

Conclusion

Our conclusion is that the petition states no cause of action and, for that reason, the motion to dismiss should be sustained and the cause dismissed, and it is so ordered.

[fol. 170] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS ON WHICH APPELLANT WILL RELY AND OF THE PARTS OF RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed June 17, 1930.

Comes the Missouri Pacific Railroad Company, appellant herein, and in compliance with Paragraph 9 of Rule 11 of this Court submits the following statement of the points on which the appellant will rely on the hearing of the appeal of this cause, to-wit:

I

That the court erred in refusing the temporary injunction and restraining order prayed for by the plaintiff, restraining the defendants from enforcing the Arkansas Full Train Crew Law (Sections 8577 and 8579, Crawford & Moses' Digest of the Statutes of Arkansas for 1921) and the Arkansas Full Switching Crew Law (Sections 8583 and 8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921), which statutes of said State, attempting to govern the operation and length of freight trains used in interstate commerce, are clearly inconsistent with the entire comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act, as amended by the Transpor-
[fol. 171] tation Act of 1920 and by the Railroad Labor Act of 1926.

II

That said Full Train Crew and Full Switching Crew Laws of the State of Arkansas, above referred to, are inconsistent with, and in violation of, paragraphs 10 and 21 of Section I of the Act to Regulate Commerce as amended by the Transportation Act of 1920, known as the "Car Service Sections" of the Interstate Commerce Act.

III

Said Acts of the General Assembly of the State of Arkansas are inconsistent with Sections 13, 15 and 15-a of the Interstate Commerce Act, as amended by the Transportation Act of 1920.

IV

Said Acts of the General Assembly of the State of Arkansas are inconsistent with the spirit and intent of the Federal Railroad Labor Act of 1926.

V

Said Acts of the General Assembly of the State of Arkansas are in contravention of the Constitution of the United States, especially of the Interstate Commerce Clause of the Constitution of the United States: Section Eight, Article One of said Constitution.

VI

That the court erred in holding that the Congress of the United States, by the above statutes, had not occupied the field covered by these State statutes, above referred to, and delegated to the Interstate Commerce Commission complete and full authority over the subject matter attempted to be covered by these said State statutes.

VII

That the court erred in holding that the decisions of the United States Supreme Court in the cases of

C. R. I. & P. Ry. Co. v. State of Arkansas, 219 U. S. 453, and

St. L., I. M. & S. Ry. Co. v. State of Arkansas, 240 U. S. 518,

in view of the subsequent legislation by Congress, above [fol. 172] referred to, were conclusive upon said Court and prevented it from restraining the enforcement of said Statutes of the General Assembly of the State of Arkansas.

VIII

That the courts erred in holding that Congress had not used "fairly clear language" in the amendments to the Transportation Act above referred to, removing from the states the power to prescribe the length of freight trains used in interstate commerce.

IX

That the court erred in holding that the Congressional legislation above referred to had not "specifically expressed a grant to the Commission of power to control the number of employees to be used by a carrier in the movement of its trains or cars in interstate commerce," when paragraphs 10 and 21 of Section One of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, clearly and explicity delegate to the Interstate Commerce Commission the power to prescribe "safe and adequate car service," which is expressly defined by paragraph 21 of Section One and paragraph 10 of Section One of the Act to Regulate Commerce to require and regulate the "safe and adequate supply of trains by any carrier by railroad subject to this Act."

X

That the court erred in holding that the word "practice" was so vague and indefinite, as this term was used in the Transportation Act of 1920, Sections 13, 15 and 15-a, that the Interstate Commerce Commission had not been fully empowered to stop such practice, required by the General Assembly of the State of Arkansas, above referred to, which resulted in such excessive expenditure of carrier funds without corresponding benefit and, hence, was "a regulation or practice," made or imposed by authority of any State, which was inconsistent with the power delegated [fol. 173] by Congress to the Interstate Commerce Commission.

XI

That the court erred in holding that the revealed purpose of these subdivisions is to prevent "discriminations favorable to intrastate commerce at the expense, and to the detri-

ment, of interstate commerce" only as to rates, when the annual expenditure of $600,000.00, which these laws of the State of Arkansas compel the plaintiff to expend without any corresponding benefit, was clearly the result of "regulations and practices of a State, inconsistent with the general scheme and object sought to be attained by the Transportation Act of 1920.

XII

That the court erred in holding that the words "practice" and "practices", as used in the Transportation Act, "are, when given their broadest permissible meaning, confined to such as are originated by the carrier," when the general scheme and purpose of the Transportation Act were intended to prevent such discriminations against interstate commerce and such wholesale expenditures as those imposed by these Acts of the General Assembly of the State of Arkansas, which are clearly unreasonable and uneconomical, and imposed a "practice" in violation of the spirit and intent of the Transportation Act.

XIII

That the court erred in holding that, by the Transportation Act, Congress had not conferred upon the Interstate Commerce Commission "the power to supervise carrier expenditures,—at least, to the extent of preventing waste or improvidence," and, "to uphold such power in the Interstate Commerce Commission would be a decided step in advance of any congressional action."

XIV

That the court erred in holding that the sections of the Transportation Act above referred to confer upon the In-[fol. 174] terstate Commerce Commission "no power of directly supervising carrier expenditures," and that said sections of the Transportation Act are "clearly aimed only at voluntary expenditures by the carrier" and do not apply to such unreasonable and extravagant expenditures exacted by individual States, which have a tendency to, and clearly do, break down the national transportation agencies intended to function, as a whole, for the benefit of the public.

XV

That the court erred in holding that the purpose and intent of the congressional Labor Act of 1926 was only "to prevent interruption of interstate commerce by strikes and lockouts," when the Railroad Labor Act clearly includes a medium and machinery for the peaceful and orderly settlement of disputes involving "conditions of employment" and "working conditions," which are the subject of agreement between the carriers and their employees, which is the whole subject matter of the said Acts of the General Assembly of the State of Arkansas complained of in the plaintiff's bill.

XVI

That the court erred in concluding that the plaintiff's petition stated no cause of action and, for that reason, dismissing the cause at the cost of the plaintiff.

XVII

That the court erred in refusing the plaintiff a temporary injunction to prevent the enforcement of the illegal statutes complained of in the plaintiff's bill.

Designation of the Parts of Record to be Printed

I

The bill of complaint and affidavits of J. H. Amos, L. W. Baldwin, W. E. Brooks, J. Cannon, M. T. Fulton, H. P. Galbreath, O. A. Garber, E. A. Hadley, E. H. Holden, Jas. E. Hutchinson, F. P. Johnson, W. G. Koch, C. F. Larson, and [fols. 175 & 176] D. O. Ouellet, in support thereof.

II

The motion to dismiss and the affidavit of Frank Aldrich in support thereof.

III

The order of the Court dismissing the bill of complaint, and the opinion of the Court.

IV

Petition for appeal and the appeal bond.

V

The assignment of errors.

VI

The order granting the appeal and the citation with waiver of service endorsed thereon.

Respectfully submitted.

Edward J. White, Thomas R. Pryor, Solicitors for Appellant.

Receipt of copy of the above and foregoing statement of points upon which appellant will rely and designation of parts of record to be printed is hereby admitted and service thereof waived this 11th day of June, 1930.

Hal L. Norwood, Attorney General of Arkansas. Chester Holland, Prosecuting Attorney. Twelfth Judicial District. —— ——, Prosecuting Attorney, Thirteenth Judicial District.

[fol. 177] [File endorsement omitted.]

Endorsed on cover: File No. 35,115. W. Arkansas D. C. U. S. Term No. 193. Missouri Pacific Railroad Company, appellant, vs. Hal Norwood, Attorney General of the State of Arkansas; Joe, Joiner, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, et al., etc. Filed June 9, 1930. File No. 35,115.

FILE COPY

FILED
JUN 23 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

vs.

HAL NORWOOD, Attorney-General of the State of Arkansas,

JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and

CHESTER HOLLAND, Prosecuting Attorney for the Twelfth Circuit of Arkansas, Appellees.

No. 193.

Appealed from the United States District Court for the Western District of Arkansas.

APPELLANT'S STATEMENT OF JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT.

THOMAS B. PRYOR,
EDWARD J. WHITE,
Attorneys for Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

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HAL NORWOOD, Attorney-General of the State of Arkansas,

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No. 193.

Appealed from the United States District Court for the Western District of Arkansas.

APPELLANT'S STATEMENT OF JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT.

In accordance with rule 12 of this court, the appellant presents this, its statement disclosing the basis on which, it is contended, this Court has jurisdiction to review, on appeal, the judgment and decree of the District Court of

the United States within and for the Western District of Arkansas:

The appeal is prosecuted from an order dated April 26, 1930, of the Three-Judge Court, organized as provided by the federal code, dismissing the appellant's (plaintiff's) bill and refusing to restrain the defendants, the Attorney-General and Prosecuting Attorneys of the State of Arkansas, from enforcing what are known as the "Arkansas Full Train Crew Law" (Sections 8577-8579, Crawford & Moses' Digest of the Statutes of Arkansas for 1921) and the "Full Switching Crew Law" (Sections 8583-8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921).

The appeal was allowed by said Three-Judge Court on May 13, 1930, and a transcript of the record deposited with the clerk of the Supreme Court on June 9, 1930.

That said appeal was prosecuted under the provisions of the Act of February 13, 1925, from a decree in a suit in equity in said District Court.

That appellant has duly served the appellees with copies of the citation in said cause and the service of said citation has been duly filed with the clerk of the Supreme Court and a bond was duly filed and approved by the District Court to cover the costs in this court.

That the appellant relies upon the points and specifications of error in this court set forth numerically in its assignment of errors filed in the District Court, and direction is here given to print the entire record filed with the clerk of the Supreme Court.

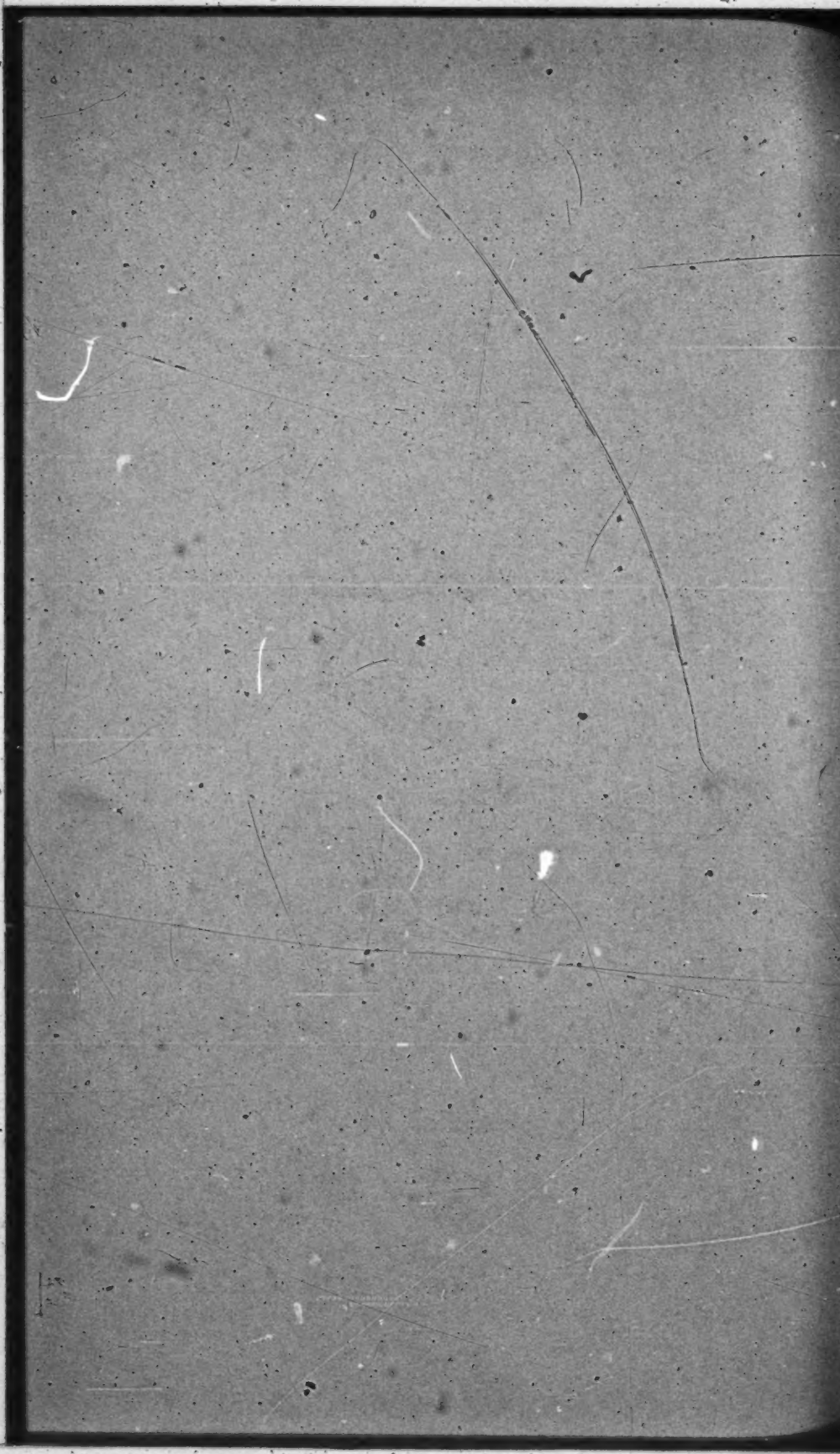
That the appellant, in its bill filed in this cause, alleged that the above laws of the State of Arkansas were in contravention of the Constitution of the United States and the order and decree appealed from upheld the constitutionality of said laws.

That the judgment appealed from is a final judgment, dismissing the plaintiff's bill, and the appeal presents a federal question and invqlves a construction of the Act to Regulate Commerce, and said appeal was timely granted, and this Court has jurisdiction both over the subject matter of said cause and the parties thereto, as evidenced by the following cases:

Chappell v. U. S., 160 U. S. 499;
Raton Waterworks Co. v. City of Raton, 249 U. S. 552;
Arkadelphia Milling Co. v. St. L. S. W. Ry. Co., 249 U. S. 134;
Rooker v. Fidelity Trust Co., 263 U. S. 413.

Wherefore, appellant prays that the errors set forth in its assignment of errors may be corrected and for a reversal of the decree of the Three-Judge Court sitting in this cause for the District Court of the United States within and for the Western District of Arkansas, and for which appellant will ever pray.

THOMAS B. PRYOR,
EDWARD J. WHITE,
Attorneys for Appellant.



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APPELLANT'S STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT.

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EDWARD J. WHITE,
Counsel for Appellant.

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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 193.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

vs.

HAL NORWOOD, ATTORNEY-GENERAL OF THE STATE OF ARKANSAS; JOE JOINER, PROSECUTING ATTORNEY FOR THE THIRTEENTH CIRCUIT OF ARKANSAS, ET AL., ETC.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The appeal in this case is prosecuted from an order, dated April 26, 1930, of a three-judge court of the United States for the Western District of Arkansas, organized as provided by the Federal Code, dismissing the appellant's

(plaintiff's) bill and refusing to restrain the defendants, the Attorney-General and Prosecuting Attorneys of the State of Arkansas, from enforcing what are known as the Arkansas Extra Brakeman and Extra Switchman Laws (Laws of Arkansas 1907, No. 116, and Act of February 20, 1913; Sections 8577, 8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921). The appeal was allowed by said three-judge court on May 13, 1930, and a transcript of the record deposited with the Clerk of the Supreme Court on June 9, 1930 (Tr. Rec., pp. 107, 113).

The appellant, in its petition, alleged that the above laws of the State of Arkansas were in contravention of the Constitution of the United States and that the order and decree appealed from upheld the constitutionality of said laws. The appellant also alleged in its petition that said laws of the State of Arkansas were inconsistent with and in violation of the general object of the Act to Regulate Commerce, and argued that said laws were opposed to Section 1 of the Act of Regulate Commerce, as amended by the Transportation Act of 1920, and were inconsistent with Sections 13, 15 and 15a of the Interstate Commerce Act, as amended by the Transportation Act of 1920; also that said acts of the General Assembly of the State of Arkansas were inconsistent with the spirit and intent of the Federal Railroad Labor Act of 1926 and the Commerce Clause of the Constitution of the United States (Section 8, Article I of said Constitution). And appellant presents to the Court that the judgment appealed from is a final judgment dis-

missing the plaintiff's bill, and the appeal presents a federal question and involves the construction of the Act to Regulate Commerce, and said appeal was timely granted and this Court has jurisdiction over both the subject matter of said cause and the parties thereto. And appellant relies upon the decisions of this Court, cited in its statement of the grounds on which it relied, as a basis of this Court's jurisdiction in accordance with paragraph 1 of rule 12 (Tr. Rec., pp. 130, 135).

STATEMENT.

This is an appeal from an order by a three-judge court of the United States for the Western District of Arkansas, sustaining a motion to dismiss the appellant's petition, which, with affidavits sustaining the allegations of the bill, sought to restrain the enforcement of the Arkansas Extra Brakeman and Extra Switchman Laws (Laws of Arkansas, 1907, No. 116, and Act of February 20, 1913; Sections 8577-8586, Crawford & Moses' Digest of the Statutes of Arkansas for 1921). These statutes provide that no railroad operating in the State of Arkansas, engaged in the transportation of freight, shall equip any of its freight trains of 25 cars or more with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen, "regardless of any modern equipment of automatic couplers and air brakes" (Tr. Rec., p. 4). The act does not apply to railroads less than fifty miles in length, and the statute provides a penalty of not less than one hundred dollars nor more than five hundred dollars for each offense (Tr. Rec., p. 5).

What is known as the Arkansas Extra Switchman Law provides that no railroad operating yards or terminals in cities of the first and second class in the State of Arkansas, where "switching, pushing or transferring of cars are made across public crossings within the city limits," shall operate switch engines without a crew consisting of an engineer, a fireman, a foreman, and three helpers (Tr.

Rec., pp. 5, 6). A penalty of fifty dollars for each offense is provided for by this act (Tr. Rec., p. 6).

The constitutionality of these statutes was upheld by this Court as valid police regulations, in the absence of action by Congress prior to the enactment of the Transportation Act of 1920.

Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453;

St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas, 240 U. S. 518.

These decisions were before Congress empowered the Interstate Commerce Commission to regulate "the supply of trains" and they did not go to the extent of holding that these laws were necessary safety measures, but the effect of the decisions was that they came within the police power of the state, in the absence of legislation by Congress. The petition and the fourteen affidavits filed by the appellant to sustain the allegations of the petition established the fact that these laws in no way contributed to the safety of either freight-train or switch-engine operations; that a freight train of only twenty-five cars was rarely seen at the present day on any of the main trunk line roads (Tr. Rec., pp. 6, 32, 36, 40). The petition and affiadvits also alleged the fact that the standard freight and switching crew upon all the railroads in the United States consists of one less brakeman and one less switchman than were required by the Arkansas laws (Tr. Rec., pp. 6, 45, 47, 48).

The petition and affidavits filed by the appellant also showed the tremendous burden upon interstate commerce resulting from the Arkansas laws complained of, in that a compliance with the provisions of these laws cost the appellant an average of $600,000.00 per year, and the railroads of Arkansas, as a whole, in the neighborhood of a million dollars per year, all of which was unnecessary for "either efficient or safe operation" (Tr. Rec., pp. 9, 46, 47, 81, 83, 85).

The petition and affidavits set forth the improvements made upon the property of the appellant in Arkansas since the enactment of these statutes, the appellant having adopted block signals throughout the State of Arkansas, heavier rails, heavier locomotives, increased ballast, and important changes in roadway and equipment, all of which were safety measures adopted for the safety of operation of both switch engines and freight trains (Tr. Rec., pp. 33, 34, 35, 39, 43, 71, 72, 73, 74, 75, 77, 78).

The affidavits filed with the petition also affirmed that maintenance expenses had been reduced upon the appellant's railroad in the State of Arkansas by making the roadway more durable with heavier rails, anti-creepers, larger ties, deeper and heavier ballast, bridges of stronger construction, stronger and more durable freight cars of steel construction, which had displaced the wooden cars of small capacity, and larger engines equipped with safety devices and freight cars equipped with air valves regulated from the engine—all of which made for the safety

and efficiency of freight-train operation in the State of Arkansas (Tr. Rec., pp. 72, 73, 74, 75, 77, 78).

It was also alleged that grades had been reduced and new rules of safety adopted for the old rules, the mechanical transmission of power upon engines had been greatly increased and the cylinder and tractive power had been adapted to the transmission of any kind of power in any desired ratio of speed by a mere variation of proportions (Tr. Rec., pp. 44, 72, 73, 74, 75, 77).

By reason of the foreging facts, affirmed by the fourteen affidavits filed with the appellant's petition, the petition alleged that these statutes were unconstitutional and void because:

(1) Said laws invaded the field of regulation delegated by Congress exclusively to the Interstate Commerce Commission as the administrative agency of the Federal Government in 1920.

(2) Said laws would defeat the purposes of the comprehensive federal scheme of regulation prescribed in the Transportation Act of 1920.

(3) By said legislation Congress occupied the field and the state authority had been excluded thereby.

(4) Said state statutes constituted a direct regulation of interstate commerce and imposed an undue and unreasonable burden upon interstate commerce.

(5) Said laws were unreasonable and arbitrary acts in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) The damage and injury sustained by the appellant by reason of said laws were great and irreparable, and no way is provided for testing their validity, except through prosecutions for the penalties provided by the laws.

The defendants moved to dismiss the plaintiff's bill for the following reasons: Because the action of the plaintiff was in contravention of the Eleventh Amendment of the Constitution of the United States, and that it was a suit against the state; that plaintiff had a complete remedy under the laws of the state; that Congress had not specifically authorized the Interstate Commerce Commission to designate the number of railroad employes that should constitute a train or switching crew; that the Interstate Commerce Commission had adopted no rule upon this subject; that Congress had not occupied the field covered by the state legislation; that from the number of years the laws had been in effect it did not appear that they would cause the plaintiff any immediate or irreparable injury; that the legislation was within the reserved powers of the state and that the opinions of this Court constituted a final adjudication as to the validity of said laws (Tr. Rec., pp. 17-18-19).

Although the substantial allegations of the appellant's petition were admitted by the motion to dismiss, which was taken under advisement by the three-judge Court, along with the defendants' answer and their one affidavit denying the material allegations of the appellant's peti-

tion, the Court, after considering the petition and the affidavits, apparently overlooked the fact that the defendants' motion to dismiss admitted the facts alleged; but after taking the case under advisement, upon the appellant's petition and affidavits and the defendants' motion to dismiss, and single affidavit filed, entered an order dismissing the bill, from which the appellant prosecuted its appeal (Tr. Rec., pp. 130, 113).

ASSIGNMENT OF ERRORS.

Appellant assigns for error the action of the three-judge court in this cause in the following particulars:

I.

In refusing the temporary injunction and restraining order prayed for by the appellant, enjoining the Arkansas Full Train Crew Law and the Full Switching Crew Law (Sections 8577, 8586, Crawford & Moses' Digest, Statutes of Arkansas for 1921), which statutes attempted to govern the operation and length of freight trains used in interstate commerce, because said statutes were clearly inconsistent with the entire comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act, as amended by the Transportation Act of 1920.

II.

In holding that said Full Train Crew and Full Switching Crew Laws of the State of Arkansas were not inconsistent with and in violation of paragraphs 10 and 21 of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, known as the Car Service Sections of the Interstate Commerce Act (Tr. Rec., pp. 121, 122, 127).

III.

In holding that said acts of the General Assembly of the State of Arkansas were not inconsistent with Sections 13,

15 and 15a of the Interstate Commerce Act as amended by the Transportation Act of 1920 (Tr. Rec., pp. 124, 125).

IV.

In holding that said acts of the General Assembly of the State of Arkansas were not inconsistent with the spirit and intent of the Federal Railroad Labor Act of 1926 (Tr. Rec., p. 129).

V.

In holding that the Congress of the United States, by the above statutes, had not occupied the field covered by the Arkansas statutes complained of, and that Congress had not delegated to the Interstate Commerce Commission and the Railroad Labor Board competent and full authority over the subject matter attempted to be covered by the said Arkansas statutes (Tr. Rec., p. 120).

VI.

In holding that it was bound by the decisions of this Court in the case of Chicago, Rock Island & Pacific Ry. Co. v. State of Arkansas, 219 U. S. 453, and St. Louis, Iron Mountain & Southern Ry. Co. v. State of Arkansas, 240 U. S. 518, in view of the subsequent legislation by Congress which was not before this Court and was not considered in the cases above referred to (Tr. Rec., p. 115).

VII.

In holding that Congress had not used "fairly clear language" in the amendments to the Transportation Act above referred to, removing from the states the power to prescribe the length of freight trains used in interstate commerce (Tr. Rec., p. 127).

VIII.

In holding that the congressional legislation above referred to had not "specifically expressed a grant to the Commission of power to control the number of employes to be used by a carrier in the movement of its trains or cars in interstate commerce," when paragraphs 10 and 21 of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, clearly and explicitly delegated to the Interstate Commerce Commission the power to prescribe "safe and adequate car service," which is expressly defined by paragraph 21 of Section 1, and paragraph 10 of Section 1 of the Act to Regulate Commerce, as the right to require and regulate the "safe and adequate supply of trains by any carrier by railroad subject to this act" (Tr. Rec., p. 120).

IX.

In holding that the words "practice" and "practices," as used in the Transportation Act, "are, when given their broadest permissible meaning, confined to such as are

originated by the carrier," when the general scheme and purpose of the Transportation Act were intended to prevent such discriminations against interstate commerce, and such wholesale expenditures as those imposed by these acts of the General Assembly of the State of Arkansas, which are clearly unreasonable and uneconomical, and impose a "practice" in violation of the spirit and intent of the Transportation Act (Tr. Rec., p. 121).

X.

In holding that, by the Transportation Act, Congress had not conferred upon the Interstate Commerce Commission "the power to supervise carrier expenditures—at least to the extent of preventing waste or improvidence," and "to uphold the power in the Interstate Commerce Commission would be a decided step in advance of any congressional action," and that the Interstate Commerce Commission, under the Transportation Act, possessed "no power of directly supervising carrier expenditure," and that the Transportation Act was "clearly aimed only at voluntary expenditures by the carrier," and did not apply to such unreasonable and extravagant expenditures exacted by different states which had a tendency to and did break down the national transportation agencies intended to function as a whole for the benefit of the public (Tr. Rec., p. 128).

XI.

In holding that appellant's petition stated no cause of action, and in refusing the appellant a temporary injunction to prevent the enforcement of the illegal statutes complained of in the appellant's bill, and in dismissing the case at cost of appellant (Tr. Rec., p. 130).

SUMMARY OF ARGUMENT.

A.

The action of the three-judge court in sustaining defendants' motion to dismiss, which admitted all the facts properly alleged, was at variance with the established rule of practice prescribed by this Court in similar cases.

Georgia Power Co. v. Decatur, 281 U. S. 505;
Chicago Junction Case, 264 U. S. 262;
Great Northern R. Co. v. Minnesota, 238 U. S. 34;
Washington v. Fairchild, 224 U. S. 510;
Reagan v. Farmers Loan Co., 154 U. S. 412;
Groesbeck v. Duluth, 250 U. S. 607;
Mississippi v. Mobile & Ohio R. Co., 244 U. S. 388;
Smith v. Texas, 233 U. S. 630;
Banton v. Belt Line, 268 U. S. 413;
Lincoln Gas & Electric Co. v. Lincoln, 250 U. S. 256.

B.

In deciding that Congress had not occupied the field of regulating "the supply of trains," and sustaining the defendants' motion to dismiss, and thus holding that Section 1 of the Act to Regulate Commerce (41 Stat. 456, 475, 476) did not authorize the Interstate Commerce Commission as an administrative body to establish the "practice" regulating "the supply of trains," the conclusion of the Court is directly opposed to that reached by the Interstate Commerce Commission in its interpretation of its powers under the "Car Service Section" of the Act to Regulate Com

merce (In re Train Service on Northern Pacific Case, No. 17,983, 112 I. C. C. 191, decided April 28, 1926), the Commission in this case having directly found:

> "We accordingly find that jurisdiction to regulate the **supply of trains** for the transportation of property has been vested in us."

C.

The decision of the three-judge court in this case that Section 1 of the Act to Regulate Commerce does not vest in the Interstate Commerce Commission the power to regulate "the supply of trains," is directly opposed to the language of the Act to Regulate Commerce and the decisions of this Court construing said act (Paragraphs 3, 10, 11, 13, 14 and 21 of Section 1 of the Act to Regulate Commerce, as amended in 1920).

Train Service on Northern Pacific, 112 I. C. C. 191;
In re Irregularities in Mine Ratings, 25 I. C. C. 286, 293;
Wisconsin Commission v. C. B. & Q. R. Co., 257 U. S. 563;
New England Divisions Case, 261 U. S. 184;
Dayton Goose Creek Case, 263 U. S. 477;
Great Northern R. Co. v. Elevator Co., 259 U. S. 285.

D.

The decision of the Court that Sections 13, 15 and 15a of the Act to Regulate Commerce, as amended by the Transportation Act of 1920, did not vest in the Interstate

Commerce Commission any power to "regulate carrier expenditures," except those that were voluntary upon the part of the carrier, is opposed to the decisions of this Court and the language of the Act to Regulate Commerce.

St. Louis & O'Fallon R. Co. Case, 124 I. C. C. 5;
St. Louis & O'Fallon v. U. S., 279 U. S. 533-34;
Case No. 12,066, Maintenance of Expenditures of Pittsburgh & Lake Erie R. R., 136 I. C. C. 527, 535;
Mitchell Coal & Coke Co. v. Pa. R. R. Co., 230 U. S. 247;
Great Northern R. Co. v. Elevator Co., 259 U. S. 285.

E.

The conclusion of the Court, in sustaining the motion to dismiss appellant's bill, that it was bound by the decisions of this Court in Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453, and St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas, 240 U. S. 518, was a misinterpretation of those decisions, since the opinions in those cases expressly stated that the Arkansas laws were valid in the absence of action by Congress, and the three-judge court failed to follow later decisions of this Court and the decisions of the Interstate Commerce Commission in holding that Section 1 of the Act to Regulate Commerce vested in the Interstate Commerce Commission the power to regulate "the supply of trains."

In re Train Service on Northern Pacific, Case No. 17,983, 112 I. C. C. 191, decided April 28, 1926;

New England Divisions Case, 261 U. S. 184;
Dayton Goose Creek Co. Case, 263 U. S. 477;
Great Northern R. Co. v. Elevator Co., 259 U. S. 285.

F.

The three-judge court failed to appreciate the allegations of the petition and affidavits regarding the improvements made in the roadbed, track, equipment and management of the appellant's railroad since these laws were passed, which obviated the necessity of the attempt on the part of the State of Arkansas to regulate the "supply of trains" engaged in interstate commerce, since these laws were enacted, and the important administrative functions delegated to and assumed by the Interstate Commerce Commission under the amendments to the Acts of Congress since such laws were passed upon by this Court; that said Arkansas statutes did not attempt to define the service required by the Extra Switchman and Extra Brakeman Laws with reference to the circumstances and conditions, so that the law would apply in proper cases and not otherwise; that said statutes took no account of the differences between the various roads, with improved trackage, equipment and switching facilities, but were made to apply to all railroads in the state "regardless of any modern equipment of automatic couplers and air brakes," and regardless of the fact that what might be necessary in the case of some railroads would be wholly unnecessary in others, and that the trackage, equipment and switching facilities

on the appellant's road at the time of filing of its petition and affidavits made unnecessary the employment of a third brakeman and the extra switchman as required by these statutes, all of which the motion to dismiss admitted.

G.

That to require an expenditure of $600,000.00 a year, without necessity for such outlay, in order to provide extra, unnecessary employes in the service of a common carrier, was an arbitrary exaction in the local interest, as admitted by the motion to dismiss, and the taking of property without due process of law, and that such absolute requirement could not be justified under the decisions of this Court. And the holding of the three-judge court that the Interstate Commerce Commission, under the powers delegated to it by Congress, was without authority to prevent such expenditures would enable the different states to prevent the entire comprehensive scheme and object of Congress in the amendment of the Act to Regulate Commerce by the Transportation Act of 1920, and particularly Section 1 of said Act as interpreted by this Court.

Colorado v. United States, 271 U. S. 153;
Alabama & Vicksburg R. Co. v. Jackson & Eastern Co., 46 Sup. Ct. Rep. 536, 537;
LaCoste et al. v. Dept. of Conservation, 263 U. S. 545;
Sanitary District of Chicago v. U. S., 266 U. S. 405;
Oregon & Washington R. & N. Co. v. State of Washington, 270 U. S. 87, 102.

ARGUMENT.

I.

Court Erred in Dismissing Cause.

The action of the three-judge court in sustaining the defendants' motion to dismiss is at variance with the rule of practice prescribed by this Court.

The conclusion of the Court against the federal right claimed under the Fourteenth Amendment overlooked the fact that a violation of this right was alleged to depend upon specific allegations of fact, which the motion to dismiss admitted. The plaintiff's petition alleged that the extra switchmen and extra brakemen laws of Arkansas were not used in standard railroad practice at the present time; that since said laws were passed, additions and betterments had been made to the road and equipment of the plaintiff's property in making stronger and more secure the rails, roadbed and bridges, reducing the grades, procuring heavier, stronger and safer engines and cars and safer power, so that today freight trains containing many more cars than those which could be safely operated when said laws were enacted could now be operated in Arkansas and through the other states where the plaintiff's lines extended. That such additions and betterments, costing many millions of dollars, had been made by the plaintiff for the express purpose of enabling it to increase its operating efficiency, economy and safety, and the running of larger and heavier freight and passenger trains, and that

said trains were commonly, safely and economically operated throughout the United States, and over lines substantially the same as plaintiff's lines extending through the State of Arkansas, without such extra switchmen and extra brakemen required by the Arkansas laws (Tr. Rec., pp. 6-7).

That there was no reason, from the standpoint of safety or from any other standpoint, why such extra switchmen and extra brakemen should be employed upon switch engines and freight trains operated through the State of Arkansas, and by reason of said expenditures for roadbed and equipment, and by increasing the length of freight and passenger trains and by consolidation of through freight traffic at origin terminals into trains which run through to terminals as far distant as circumstances would permit without being broken up, the plaintiff had been enabled, outside of the State of Arkansas, to effect great economies in operation, but the laws of Arkansas prevented the plaintiff from effecting such economies while operating its trains and engines into and through said state (Tr. Rec., p. 7).

That the standard crew engaged generally upon all the railroads of the United States outside the State of Arkansas consisted of switching crews of a foreman and two helpers and a standard freight crew of a conductor and two brakemen. That the laws of Arkansas complained of entailed an annual useless expenditure of $600,000.00 per year. Plaintiff also set up that by reason of these facts, said laws of Arkansas were in conflict with the Fourteenth

Amendment to the Constitution of the United States; that said statutes constituted an undue and unreasonable burden on interstate commerce in violation of the Commerce Clause of the Constitution; that said statutes were unreasonable and arbitrary; that they did not provide whereby the validity of the statutes could be tested; and that said statutes were in conflict with the general scheme of federal regulation provided for in the Interstate Commerce Act as amended by the Transportation Act of 1920, and were inconsistent with the jurisdiction of the Interstate Commerce Commission to which Congress, as an administrative measure, had delegated the entire subject attempted to be regulated by the said statutes of Arkansas (Tr. Rec., pp. 6, 8).

In view of these allegations of the petition, the action of the Court in sustaining the motion to dismiss, which admitted all the facts properly alleged, was clearly at variance with the established rule of practice prescribed by this Court in similar cases.

Where petition alleges a violation of the Fourteenth Amendment because of the enforcement of a state statute, under facts and circumstances pleaded as amounting to a deprivation of plaintiff's property without due process of law, it is error to sustain a motion to dismiss the petition without examining into the merits of the plaintiff's case, since the motion to dismiss admits the facts alleged and all legal inferences attaching thereto.

Georgia Power Co. v. Decatur, 281 U. S. 505;
Chicago Junction Case, 264 U. S. 262;

Great Northern R. Co. v. Minnesota, 238 U. S. 34 and 35;
Washington v. Fairchild, 224 U. S. 510;
Reagan v. Farmers Loan Co., 154 U. S. 412;
Groesbeck v. Duluth, 250 U. S. 607;
Mississippi v. Mobile & Ohio R. Co., 244 U. S. 388;
Smith v. Texas, 233 U. S. 630;
Banton v. Belt Line, 268 U. S. 413;
Lincoln Gas & Elec. Co. v. City of Lincoln, 250 U. S. 256;
Spring Valley Water Works v. San Francisco, 124 Fed. Rep. 574.

In the recent case of Georgia Power Co. v. Decatur (281 U. S. 505) Mr. Justice Butler said:

"The state may not, by any of the agencies, disregard the prohibitions of the Fourteenth Amendment. * * * **We are therefore required to pass upon the merits of petitioner's claim.**"

In the Chicago Junction case Mr. Justice Brandeis said:

"We must take that fact as admitted for the purposes of this appeal. The allegation is made as one of fact. There is no suggestion in the motions to dismiss (which are both general and special) that this fact is not well pleaded; or that a copy of the evidence introduced at the hearing should have been annexed to the bill. * * * To refuse to consider evidence introduced or to make an essential finding without supporting evidence, is arbitrary action. As it was admitted by the motion that the order was unsupported

by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiff" (264 U. S. 262).

The rule is laid down by Judge Van Devanter in Ward v. Love County (253 U. S. 20) as follows:

> "As a conclusion from these facts, the claimants asserted that the taxes were collected by Love County by coercive means, that their collection was a violation of a right arising out of a law of Congress and protected by the Constitution of the United States. * * * The facts set forth in the petition, all of which were admitted by the demurrer, **whereon the county elected to stand**, make it plain, as we think, that the finding or decision that the taxes were paid **voluntarily** was without any fair or substantial support."

And in Union Pacific v. Public Service Com. (248 U. S. 67), Mr. Justice Holmes said:

> "It is the duty of this Court to examine for itself **whether there is any basis in the admitted facts**, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived."

II.

Court Erred in Construing Car Service Section of Interstate Commerce Act.

In deciding that Congress had not occupied the field of regulating "the supply of trains" in sustaining the defendants' motion to dismiss, and thus holding that Section

1 of the Act to Regulate Commerce (41 Stat. 456, 475, 476) did not authorize the Interstate Commerce Commission, as an administrative body, to establish the "practice" regulating the supply of trains, the conclusion of the Court is directly opposite to that reached by the Interstate Commerce Commission in its interpretation of this same section of the Act to Regulate Commerce.

The definition of "Car Service" to include "and the supply of trains" was enacted, for the first time, in the Transportation Act of 1920 (41 Stat. L. 476). The term "Car Service," as it appeared in the Esch Car Service Act of May 29th, 1917 (40 Stat. L. 101), did not include "the supply of trains," but only included "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this Act." In other words, the right of the Commission to regulate "the supply of trains" had not been included in the congressional legislation prior to the Transportation Act of 1920, and such power had not been conferred upon the Commission when the Arkansas Extra Brakeman and Extra Switchman Acts were before this Court and considered in the decisions upholding the legality of those statutes.

In re Train Service on Line of Northern Pacific, case No. 17,983 (112 I. C. C. Rep. 191), the Interstate Commerce Commission, on April 28, 1926, held as follows:

> "Respondent also moved to dismiss the proceeding upon the ground that in so far as it relates to passen-

ger service we were without jurisdiction and that with reference to the transportation of property the evidence showed that curtailed service, as proposed, was justified.

"The case presents, therefore, two questions, (1) whether the Interstate Commerce Act, as amended, gives us jurisdiction to regulate **the supply of trains**, (2) if the first be answered affirmatively, whether by the curtailment in service, as proposed, the respondent would furnish **adequate car service** which would be just, reasonable and lawful. We shall consider these propositions in the order stated."

* * * * * * *

"The State of North Dakota contends that it, through the Board of Railroad Commissioners, has sole jurisdiction over **train service** within the state and that we have no jurisdiction over **train service**. It relies principally upon the addresses and debates in Congress at the time the transportation act was under consideration as tending to show that it was the intention of the Congress that jurisdiction over such matters by this Commission was to be exercised only in times of emergency, and that we have no authority to regulate the usual freight service maintained on any line of railroad. In this connection reference is made to the decision of the Supreme Court of the United States in the case of Peoria Ry. Co. v. United States, 263 U. S. 528, as upholding this contention. The matter of train service was not before the Court. The question there presented was whether this Commission had authority, under given circumstances, to order a terminal carrier to switch, by its own engines and over its own tracks, freight cars tendered by or for

another connecting carrier. The Court was therefore considering whether we could under the emergency powers conferred by paragraphs 15 and 16 of section 1 of the act regulate switching of cars by one carrier for another, under the circumstances and in the manner there presented.

"Let us consider the provisions of section 1 of the act. Paragraph 10 provides:

" 'The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.'

"Paragraph 11 provides:

" 'It shall be the duty of every carrier by railroad subject to this act to furnish safe and adequate car service and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful.'

"These are fundamental and basic provisions. Paragraph 10 defines the term 'car service.' Paragraph 11 sets forth the duty of carriers with respect to each and all of the matters included in the definition. We think that duty is continuous and not limited to times of emergency or otherwise. It is the duty of carriers to furnish safe and adequate car service. The terms are used with equal force. Could it be said that the duty of furnishing safe car service is in force only in

times of emergency? We think not, and the same is true with respect to the term 'adequate.' It is the duty of the carriers subject to the act to furnish 'safe and adequate' car service at all times.

"Paragraph 14 of section 1 provides that—

" 'The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad, including the practices with respect to car service by carriers by railroad, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices.'

"Section 15 also provides—

" 'That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, * * * the Commission shall be of the opinion that * * * any practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable * * * or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what * * * practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * *.'

"From the foregoing it seems clear that the Interstate Commerce Act makes it the duty of every carrier subject thereto to furnish an adequate 'supply of trains' for the transportation of property, **and confers upon us authority to determine and prescribe, after full hearing, what practice in this respect is or will be just, fair and reasonable, to be thereafter followed, and to enter an appropriate order.**

"Conflict of jurisdiction similar to that here encountered has often been before the courts. In Missouri Pacific R. R. Co. v. Stroud, 267 U. S. 404, the Supreme Court of the United States said:

" 'It is elementary and well settled that there can be no divided authority over interstate commerce, and that acts of Congress on that subject are supreme and exclusive.'

"In Savage v. Jones, 225 U. S. 501, the Court said:

" 'When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.'

"We accordingly find that jurisdiction to regulate the supply of trains for the transportation of property has been vested in us."

* * * * * * *

"The record shows that revenues derived from the line under consideration are not sufficient to defray the expense of the present service. It is also clear that the proposed curtailment in service will result in substantial savings. We believe the proposal can be made effective without impairing the service rendered to an extent that will be unjust or unreasonable. After careful consideration of all the facts of record, we find that the proposed discontinuance by respondent of daily mixed-train service on the branch line under consideration will not be unjust, unreasonable, or unlawful, and that the establishment in lieu of such daily train service of triweekly service will furnish adequate service to the communities served by such branch line. The proceeding will be discontinued.

"An appropriate order will be entered."

The decision of the three-judge court that the word "practice," as used in Sections 1, 13, 15 and 15a of the Transportation Act, is not broad enough to include the regulation of "the supply of trains" is at variance with the generally accepted meaning of the term. The essence of the word is "uniformity," and when the terms is used in an act of Congress to be dealt with by the administrative branch of the Federal Government with regulation and uniformity over a given subject matter, such as regulating "the supply of trains" or fixing of rates, then there is such uniformity contemplated as should demonstrate the error of the three-judge court in this case.

Nor. Pac. R. Co. v. Solum, 247 U. S. 477.

"Car service," as used in the statute, connotes the use to which the vehicles of transportation are put and contemplates a general, uniform use under the regulatory body, the Interstate Commerce Commission. The entire subject matter is entrusted to the Interstate Commerce Commission and the states have no duty to perform in this regard.

Gardner v. L. & N. R. Co., 212 Ky. 540, 279 S. W. Rep. 947.

The reasonableness of all rules touching "car service" and "the supply of trains" under the act of Congress is for the Interstate Commerce Commission.

Penn. R. Co. v. Puritan Mining Co., 237 U. S. 121.

A "train," within the meaning of this statute, is an aggregation of cars drawn by a locomotive upon a railroad engaged in interstate commerce, as distinguished from switching operations or assembling cars in railroad yards.

U. S. v. Nor. Pac., 254 U. S. 251;
U. S. v. C. B. & Q. R. Co., 237 U. S. 410;
Louisville Bridge Co. v. U. S., 249 U. S. 534.

In Morrisdale Coal Co. v. Pa. R. R. Co. (230 U. S. 304), where the question of the reasonableness of a rule of car distribution was before this Court, it was held:

"The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn case, 215 U. S. 481, and in I. C. C. v. Illinois Central, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated."

In the case of Pennsylvania R. R. Co. v. Puritan Coal Co. (237 U. S. 121) the plaintiff's case was to recover damages occasioned by unjust discrimination in the supply of coal cars. This Court said:

"But it must be borne in mind that there are two forms of discrimination, one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discrimination of the administrative power, which has been vested by Congress in the Commission. It is for that body to see whether the rule unjustly discriminates against one class of shippers in favor of another."

III.

Congress Has Vested Regulation of "Train Supply" in Interstate Commission.

The decision of the three-judge Court in this case that Section 1 of the Act to Regulate Commerce does not vest in the Interstate Commerce Commission the power to regulate "the supply of trains" is directly opposed to the language of the Act to Regulate Commerce and to the decisions of this Court construing said act.

Section 1, Paragraph 3 of the Act to Regulate Commerce, provides:

> "The term 'transportation' as used in this act shall include locomotives, cars and other vehicles."

Section 1, paragraph 10, of the act provides as follows:

> "The term 'car service' in this act shall include the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and **the supply of trains by any carrier subject to the act.**"

Section 1, paragraph 11, provides:

> "It shall be the duty of every carrier by railroad subject to this act to furnish **safe and adequate car service** and to establish, observe and enforce just and

reasonable rules, regulations and practices with respect to car service; and every unjust and unreasonable rule, regulation and practice with respect to car service is prohibited and declared to be unlawful."

Section 1, paragraph 14, provides:

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations and practices with respect to car service by carriers by railroad."

By these sections Congress, in 1920, delegated specifically to the Interstate Commerce Commission, as an administrative body, the absolute and exclusive right to regulate "**the supply of trains** by any carrier subject to the act." And the Commission is expressly authorized to "establish reasonable rules, regulations and practices with respect to car service." When car service is, by the provision of the act itself, defined as including the right to regulate "**the supply of trains,**" it should be plain that Arkansas, nor any of the other states, can regulate or condition the length of freight trains, with this power specifically vested by Congress in the Interstate Commerce Commission.

As said by the Interstate Commerce Commission in Re Irregularities in Mine Ratings (25 I. C. C. 286, 293):

"If the carriers were to equip themselves with cars, motive power, tracks and terminals, so as to meet

at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities."

Paragraph 21 of Section 1 provides as follows:

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act party to such proceeding to provide itself with **safe and adequate facilities** for performing as a common carrier its car service as that term is used in this act, and to extend its line or lines; provided, that no such authorization shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, **or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public.**"

In view of these specific provisions of the amended Act to Regulate Commerce, it seems impossible to escape the conclusion that the regulation of car service, including "the supply of trains," is an administrative function, depending upon the exercise of the expert knowledge and judgment of the Commission which shall be exercised consistently with **"the expense involved therein which will not impair the ability of the carrier to perform its duty to the public."**

This conclusion is further borne out by section 15 (a),

relating to rates, wherein the provision is made for "reasonable expenditures for maintenance of way, structure and equipment."

And by Paragraph 12 of Section 1 of the Act to Regulate Commerce the Commission is to supervise the "just and reasonable distribution" of cars so that the "safe and adequate" facilities for performing by a common carrier its car service duty shall be safeguarded to the public.

Both by the express provisions of the Transportation Act of 1920 and the defined purpose of Congress in its enactment, the exclusive right to regulate car service and "the supply of trains" was vested within the administrative discretion of the Interstate Commerce Commission. The object of the Transportation Act is thus stated by this Court in Wisconsin Commission v. C. B. & Q. R. R. (257 U. S. 563, 585):

> "Therefore, the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provision of the law that inured to the benefit of the carriers was the requirements that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates, and to take other important steps to maintain an adequate railway service for the people of the United States."

In the New England Division Case (261 U. S. 184) this Court said:

> "The effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to insure also **adequate transportation service.**"

In the Dayton-Goose Creek case the Court said:

> "To achieve this great purpose it puts the railroad systems of the country, more completely than ever, under the fostering guardianship and control of the Commission which is to supervise their issue of securities, **their car supply and distribution,**" etc.

Dayton-Goose Creek Co. v. U. S., 263 U. S. 477.

Surely, the duty cannot be shifted from the Commission, whether the train or car supply is for the benefit of shippers or for the benefit of employes of the carrier? The question is still an administrative one and depends upon the expert knowledge and discretion of the body delegated by Congress with the performance of this function.

By paragraph 13, section 1, the Commission is authorized "by general or special orders to require all carriers by railroad subject to the act or to any of them, to file with it, from time to time, their rules and regulations with respect to car service."

By paragraph 14, section 1, the Commission is further authorized to "establish reasonable rules, regulations and

practices with respect to car service by carriers, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier."

When the Commission is thus delegated by Congress with the performance of this function, how can it be contended, under a law such as the Arkansas Extra Brakeman Act, that attempts to regulate the length of freight trains to twenty-five cars in that state upon certain conditions, is not a "practice" over which the Commission has any jurisdiction?

The jurisdiction regarding car service, vested by Congress under Section 1 of the Act to Regulate Commerce in the Interstate Commerce Commission, is, in its very nature, administrative in character:

(a) The car supply of the United States must be treated as a whole in order to meet the demands of business and to "provide the people of the United States with adequate transportation," expressly declared in section 15a of the act to be one of the purposes of the legislation. No carrier is able to hold all of its cars on its own line. It is common knowledge that probably one-third of the cars owned by any carrier are at certain times on other lines. This is true of all the railroads in the United States. This emphasizes the necessity that the question of car supply is to be considered in a broader way than along mere sectional or state lines. This cannot be done by any tribunal except an expert body. With the power of the Government behind it, the Commission can make the

investigations which are necessary, and by reason of its expert advice and the peculiar work in which it is engaged it is a body of trained experts for the settlement of questions of this nature.

(b) Not only must the general car situation be considered as affecting the "car service" by the carriers of the United States, but it is necessary that attention must be paid in the financial situation. This is true from the nature of the duties devolving upon the Commission under paragraph 21 of section 1 of the act.

A carrier, by the Transportation Act, is not required to bankrupt itself in order to comply with such regulations as the Arkansas Full Crew Bill. As said by the Commission in one case:

> "If carriers were to equip themselves with cars, motive power, tracks and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment and for the maintenance of those facilities" (25 I. C. C. 286, 293).

This is equally true of such legislation as the Arkansas Full Crew and Full Switching Crew Laws.

(c) Another important factor to be taken into consideration is the ability of the carrier to secure motive power to move such additional trains required to transport its freight in freight trains of only twenty-five cars in length. If one state can prescribe that only freight trains of twenty-five cars in length should be used to transport the interstate commerce of the country, another state can provide that trains not over five or ten cars in length shall alone be operated within its

borders, and the carrier must purchase equipment and motive power to operate all these additional trains. Such requirements would be wholly inconsistent with the comprehensive object of the Transportation Act.

(d) In addition to this, it must be remembered that the interest of the general public is just as important as that of the carrier and its employes. The interest of 120,000,000 of people is more important than the question of whether additional brakemen and additional switchmen shall be employed in any given state.

(e) Finally, the jurisdiction conferred upon the Commission by the car service sections of the Act to Regulate Commerce is administrative in its nature because it involves the consideration and determination of what constitutes a reasonably safe and adequate car supply, including the right to regulate "the supply of trains," and into this question there must necessarily enter various elements which the state Legislatures are not properly qualified to pass upon,

> "• • • for the adequate appreciation of which, acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts."
>
> Great Northern R. R. Co. v. Elevator Co., 259 U. S. 285.

The car service section of the act expressly authorizes the Commission to require any carrier to provide itself with such "safe and adequate facilities for car service," unless the Commission finds that "the expense involved

therein will not impair the ability of the carrier to perform its duty to the public."

The Commission is thus directed to consider any regulating "**practices**" of railroads regarding cars and "the supply of trains," the financial condition of the carrier, whether the expenditure will be justified by increased earnings, or whether the shipping public will be obliged to pay interest upon the investment and for the maintenance of the facilities, the needs of the class of shippers for whose use additional facilities are demanded, in order that the Commission may see to it that the proper service is rendered "in the interest of the commerce of the United States considered as a whole" (paragraph 5, section 15a).

Thus, by section 1 and section 15a, the advisability of the expenditure must be considered in view of the relation of the carrier to the transportation needs of the country as a whole—and not with regard to the employes of a given state—and particularly in relation to the rate group or territory to which it may be assigned by the Commission.

In prescribing the employment of employes based upon the unreasonable requirement that freight trains shall not exceed 25 cars in length, what concern has the Arkansas Legislature in regard to the specific duty delegated to the Interstate Commerce Commission "to see to it that all expenditures for equipment are reasonable"?

In fact the provision of the Arkansas Extra Brakeman Act, limiting the length of a freight train to twenty-five cars, is operative "regardless of any modern equipment of automatic couplers and air brakes" (Tr. Rec., p. 4).

It must necessarily be held that the rate-making duties provided by section 15a are administrative in their nature and within the exclusive jurisdiction of the Commission.

Abilene Cotton Oil Case, 204 U. S. 426.

This being true, it is submitted that a construction cannot be justified which would hold the duties of a like nature, involving highly technical knowledge and investigation, such as regulating "car service" and "the supply of trains," as provided in section 1 of the act, when the paramount purpose is to secure uniformity just as much as in the case of rates, are not administrative in character but are within the concurrent jurisdiction of the Commission and the different states.

The term "car service," which includes the movement of engines and cars and the supply of trains and the furnishing of safe car service, necessarily includes the number of men required to operate such trains.

As said by Mr. Justice Brandeis, in the case of

Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244,

"The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so shows that the jurisdiction of the Commission over such connections must be exclusive if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively per-

formed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction" (271 U. S. 244).

In the Dayton Goose Creek case (263 U. S. 477), this Court said, regarding the Transportation Act:

"It aims to give the owners of the railway an opportunity to earn enough to maintain their operations and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Interstate Commerce Commission, which is to supervise their issue of securities, **their car supply and distribution,** their joint use of terminals, their construction of new lines, their abandonment of old lines, and by the proper division of joint rates and by fixing adequate rates for interstate commerce to secure a fair return upon the properties of the carriers engaged."

If the different states and the Interstate Commerce Commission are to both have jurisdiction over the safety and adequacy of "car service" and "the supply of trains," then there could be no uniformity in the enforcement of the act of Congress. This must result from the following illustration:

The plaintiff is a common carrier with a total mileage of 10,000 miles, 1,700 of which extend into and through the State of Arkansas. It has a total car supply of 50,000 freight cars which are divided between ten different states in the Middle West, based upon the density of the freight traffic in those states, together with engines sufficient to move all of those trains in cars of the average length of freight trains prevailing throughout the United States of from fifty to one hundred cars in length. If the State of Arkansas, by its legislative act, can require that all the freight trains operated in that state shall be only in trains of twenty-five cars, and the average length of a freight train is from fifty to one hundred cars, then it would require two or three times the motive power and employes to operate trains in Arkansas that it does in the other states where the plaintiff operates freight trains of two or three times that length with one engine and a standard freight crew, and thus the uniformity and the service to the public which the Transportation Act intended to safeguard is destroyed because of the inconsistent regulations of such legislative acts upon the part of the different states.

By these provisions of Section 1 of the Act to Regulate Commerce, as amended in 1920, the Interstate Commerce Commission is given complete jurisdiction by Congress to regulate "the supply of trains," whereas the Arkansas Extra Brakeman Bill attempts to usurp this function and to vest in the Attorney-General and Prosecuting Attorneys

of the State of Arkansas the power to recover penalties against the common carriers of the state, engaged in interstate commerce, for their failure to respect a state law limiting the length of freight trains to twenty-five cars. We submit that such legislation is clearly inconsistent with the car service sections of the Act to Regulate Commerce, as amended in 1920.

IV.

Interstate Commerce Commission Is Authorized to Regulate Carrier Expenditures.

The defendants, before the three-judge court, contended that "the Commission has been given no affirmative power to regulate the discretion of the management to determine what practices are efficient and economical." In the O'Fallon case the Interstate Commerce Commission expressly held that it had power to regulate the expenditures of a carrier and to hold such expenditures within the legislative limits of what were "economical" and "reasonable." The Commission, in its opinion in the O'Fallon case, and the decision of this Court in the O'Fallon case should be a clear refutation of this argument.

In the case of Excess Income of St. Louis & O'Fallon Ry. Co. (124 I. C. C. 5) Commissioner Meyer, for the Commission, took up in the course of the Commissioner's report:

"Third, the propriety of certain dispositions of income through charges to operating expenses during the respective recapture periods."

In the course of its opinion the Commission considered the payments made by the carriers to its president and general manager and upon this issue it said:

"The president of the two companies, William Cotter, assumed his duties as president in 1916 at annual salaries of $6,000 from each carrier, or a total annual compensation from these carriers of $12,000. In 1920 his salary as president of the O'Fallon was increased to $10,000, making his total annual compensation from these roads $16,000. * * * The O'Fallon paid to its president the full amount of $25,000. agreed to in the minutes quoted. * * * In 1916 August A. Busch received a salary of $2,400 as chairman of the board of directors of the O'Fallon and a like salary as chairman of the board of directors of the Manufacturers, * * * effective April 1, 1923, pursuant to the first paragraph of the quoted minutes, his salary as chairman of the board of directors of the O'Fallon was increased from $2,400 to $15,000 per annum, and effective the same date, his salary for a like position of the Manufacturers was established at $3,000 per annum. * * * In construction and repair of railway equipment (107 I. C. C. 721), and prior reports in the same proceeding, we had before us the question of the reasonableness of the cost of repair of equipment, and in the cited case said, at page 735:

"'Without attempting to draw the exact line, the record compels us to regard a substantial

portion of the extraordinary expenditures incurred by respondent in this outside repair work as improvident and of a character which should be considered when fixing rates to yield the standard return, as provided by the act.'

"In considering the charges for compensation to the president and chairman of the board of the respective carriers as outlined above, we must bear in mind the purposes of the enactment of section 15a and the opinion of the Supreme Court of the United States respecting the disposition of income of carriers as controlled by the statute, as stated in Dayton-Goose Creek Ry. v. U. S., supra, where the Court said, at page 484:

" 'The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such title to the excess as to render the recapture of it by the Government a taking without due process.'

"It is evident from a consideration of all the circumstances surrounding the transactions referred to that all payment to the president of the O'Fallon of the $25,000, received from the Suburban out of increased divisions for past shipments and the increase in the salary of the chairman of the board in contemplation of a continuance of increased divisions in the future is without any further justification than the availability of funds from the sources indicated. In

view of the fact that the statute, as was recognized by the Supreme Court in the above quotation, makes the excess earned by an interstate railroad over a fair return on the value of its property a trust fund for the United States, we think it improper for the O'Fallon to have diverted to 'operating expenses' the portion of such trust fund represented by the increased compensation to the president and the chairman of the board of directors."

* * * * * * *

"The provision of paragraph (9) of section 15a which empowers us to 'prescribe rules and regulations for the determination and recovery of the excess income' is, in our opinion, broad authority for such adjustments of net railway operating income as are here involved. **Without such authority there would be nothing to prevent virtual defeat of the recapture provisions by the diversion of funds through unwarranted charges to operating expenses.**

* * * * * * *

"In our administration of section 15a we may not permit the purpose of the act to be defeated by the distribution under the guise of operating expenses of what is in reality excess income. * * * Manifestly considerable latitude must be given the officers of a carrier determining what are reasonably necessary charges to operating expenses, but the evidence clearly indicates that the charges here in question were not within any latitude that may properly be alleged. We are, therefore, bound to exclude such sums from consideration in our determination of net railway operating income for the period during which such charges occurred" (124 I. C. C. 12, 14, 15, 16, 17).

In considering the O'Fallon case, Mr. Justice Brandeis, in his opinion, in which Justices Sutherland and Stone concurred, in considering the report of the Commission, used the following language:

> "To make such a determination justly, the Commission must have the data on which a competent and vigilant management would insist when required to pass upon the advisability of making correct expenditures, and the Commission would be obliged to give them the same careful consideration" (St. Louis & O'Fallon v. U. S., 279 U. S. 533-34).

The report of the Commission in the O'Fallon case as to its power to go into a carrier's expenditures is a clear refutation of the position maintained by counsel for the defendants, that the Commission has no authority over the expenditures of a carrier, in order to justify this Court to hold that the states, or the carriers themselves, may fritter away their income at will. Such a contention is also further refuted by the finding of the Commission in Ex Parte 74. Such statement is also refuted by the finding of the Commission in case No. 12,066, where the Erie Railroad was compelled to desist from its "**practice**" of having its equipment repaired by contractors (128 I. C. C. 323-345), because such "**practice**" was neither efficient nor economical management. And such contention is also disputed by the decision of the Commission in case No. 16,067, known as "Maintenance of Way Expenditure of Pittsburgh & Lake Erie Railroad," where the Com-

mission, on January 2, 1928, held that the "practice" of the Pittsburgh & Lake Erie Railroad was not justified in expenditures made through contractors in the maintenance of way and labor for the upkeep of its property (136 I. C. C. 527-535). These cases should demonstrate to the Court that, under Sections 15 and 15a of the Transportation Act of 1920, Congress delegated to the Commission power to inquire into the reasonableness of the common carrier's expenditures subject to the act.

If counsel for the defendants is right in the contention that the Commission has no authority to regulate expenditures of common carriers, then, of course, that portion of section 15a, providing for the recapture by the Government of all over 6 per cent is nugatory, and the logic of the O'Fallon decision is swept away by force of the argument that the Commission is powerless to preserve the fund which, by its own order, it has created.

The Interstate Commerce Commission is the agency set up by Congress to create and preserve the income of the carriers and the interest of the Government in the excess over the 6 per cent.

If the carriers of the country can, without restriction, spend any amount they see fit, then the power of the Commission in this respect can be wholly defeated.

V.

Commission Can Regulate "Practice" Regarding "Supply of Trains."

Under the Interstate Commerce Act, as amended in 1920, the exclusive power is vested by Congress in the Interstate Commerce Commission as an administrative body to determine the reasonableness of the "practice" which the Arkansas Full-Crew Law attempts to regulate and for which the prosecutions in this case were instituted.

The definition of "Car Service" to include "and the supply of trains" was enacted, for the first time, in the Transportation Act of 1920 (41 Stat. L. 476). The term "Car Service," as it appeared in the Esch Car Service Act of May 29, 1917 (40 Stat. L. 101), did not include "the supply of trains," but only included "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this act." In other words, the right of the Commission to regulate "the supply of trains" had not been included in the congressional legislation prior to the Transportation Act of 1920, and such power had not been conferred upon the Commission when the Arkansas Extra Brakeman and Extra Switchman Acts were before the Court and considered in the decisions upholding the legality of those statutes.

In United States v. Pacific & Artic Ry. & N. Co. (228 U. S. 87), the Court said:

> "The contentions of the Government would be formidable, indeed, if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. * * * The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

In P. R. R. Co. v. International Coal Co. (230 U. S. 184), the Court, at pages 196 and 197, said:

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administration and rate regulatory body. For the reasonableness of rates and the permissible discrimination based upon the difference in conditions are matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

In Mitchell Coal & Coke Co. v. P. R. R. Co. (230 U. S. 247), the Court said:

* * * * * * *

"If the decision of such question was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

On pages 256 and 257:

* * * * * * *

"But since the Commission is charged with the duty of determining whether the **practice** was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the **practice** or the rate was thus unreasonable and, therefore, illegal and prohibited."

At page 313 of the opinion in Morrisdale Coal Co. v. P. R. R. Co. (230 U. S. 304), the following language is used:

"* * * The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the Pitcairn case, 215 U. S. 481, and in I. C. C. v. Illinois Central, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to

make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of alloting cars, neither can it do so as an incident to an action for damages."

Under a rule laid down by the Supreme Court in the case of Great Northern Ry. Co. v. Merchants Elevator Co. (259 U. S. 285), whenever the issue involved is one of fact as to the reasonableness of a given **practice**, or the sufficiency of the carrier's rules regulating car supplies, **or the movement of trains**, then the Interstate Commerce Commission must perform its administrative function before any state law or a rule of the state Commission can affect the practice of the carrier regarding car service. The decisions of the Interstate Commerce Commission are to the same effect.

In Vulcan Coal & Mining Co. v. I. C. R. R. Co. (33 I. C. C. 52), the Interstate Commerce Commission, after reviewing the decisions of the Supreme Court regarding its jurisdiction, said:

"Furthermore, one cannot escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands.

> • • • By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply cannot be definitely fixed by the statute. It is a question which, using the language of the Court in the Mitchell case, 'involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of' this tribunal."

If this is true as to cars, prior to the Amendment, since 1920 it is equally true as to "supply of trains."

From the decisions of this Court and the Interstate Commerce Commission it should be apparent, since the amendment to the Act to Regulate Commerce, that the question of car supply is, to use the language of the Interstate Commerce Commission, "just as much an administrative one as the question of what is a reasonable rate." The conditions governing the movement of trains and practices of the carrier are necessarily of an administrative character, and resort to the Commission and the determination by that body of the reasonableness of a given practice touching the supply of cars, or the movement of trains, is a *sine qua non* of the jurisdiction of the various state regulatory bodies before any jurisdiction can be recognized by the different states. That this is true is borne out by the language of the Commission in Armour Grain Co. v. Director General (57 I. C. C. 398-401), and the decision of

the Commission in the "Car Supply Investigation" (42 I. C. C. 657).

Clearly the question of what constitutes a proper "**practice**" regarding train supply, train movements and car supply under the act is just as much an administrative question as the issue as to what constitutes a reasonable rate. A reasonable rule of "practice" affects the public just as much as does a reasonable rate or lawful tariff, and neither can be determined by the states.

In Great Northern Ry. Co. v. Elevator Co., 259 U. S. 285, 291, this Court said:

> "Whenever a rate, rule or **practice** is attacked as unreasonable or as unduly discriminatory, there must be preliminary recourse to the Commission."

If each of the different states were permitted to pass train-limit bills such as the Arkansas Full-Crew Act, the carriers would soon be unable to perform their duties to the public. This for the reason emphasized in the decisions of this Court and the Interstate Commerce Commission in the following cases:

In Interstate Commerce Commission v. Ill. Cent. R. R. Co., 215 U. S. 452, 60, the Court said:

> "Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among

other things, (a) of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; (b) the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and (c) because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points to be sold after arrival and is hence held at the terminal points awaiting sale; or because, owing to the cost of handling coal and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points."

The Supreme Court in Penna. R. R. vs. Puritan Coal Co., 237 U. S. 121, 122, said:

"Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But this is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full."

In the case of

Midland Valley R. R. Co. v. Barkley et al.,
276 U. S. 482,

the Supreme Court of the United States held that an action against a railroad for damages for failure to furnish cars for use in interstate shipments of coal during a car shortage involved such an administrative question as to give the Interstate Commerce Commission exclusive jurisdiction, and jurisdiction of the state court, under Section 895, Crawford & Moses' Digest of the Statutes of Arkansas, was held superseded.

In deciding the case, Mr. Justice Brandeis said:

> "The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was **no order of the Commission** which required the Midland to distribute all available open-top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so and in allotting box cars to the wagon mines was the substantial matter in controversy. * * * **The reasonableness of the rule adopted by the carrier is a matter for the Commission,**"

citing

Penna. R. R. Co. v. Puritan Coal Co., 237 U. S. 121.

VI.

Commission's Jurisdiction Is Exclusive.

When the courts hold that Congress has so taken possession of the subject of distribution of railroad cars and "the supply of trains" by vesting in the Interstate Commerce Commission complete jurisdiction to regulate the distribution of such cars and "the supply of trains," and that the occupation of this field has invalidated provisions of state statutes regarding such distribution when applied to interstate commerce, then the states are without authority to pass such laws as the Arkansas Full Crew or Extra Switchmen bill, and such statutes must be held unconstitutional.

C. R. I. & P. v. Elevator Co., 226 U. S. 426;
Oregon R. Co. v. Martin, 229 U. S. 606;
Chicago R. Co. v. Beatly, 234 U. S. 753;
Hampton v. St. L. I. M. & S., 227 U. S. 456;
Ill. Cent. v. Mulberry Coal Co., 238 U. S. 275;
Davis v. Wire Co., 317 Ill. 278, 148 N. E. 47;
Utilities Com. v. B. & O. R. R., 281 Ill. 405, 118 N. E. 81;
L. & N. v. Brashear, 217 Ky. 439, 289 S. W. 1094;
State v. P. S. C., 95 Wash. 274, 162 Pac. Rep. 523.

And within the decisions of this Court this applies as well to terminal service where the distribution of cars, or the practice of the carrier, is involved, since the switch-

ing movements are an ingredient of the interstate transportation and are free from state regulation:

Ill. Cent. v. De Fuentes, 236 U. S. 157.

And, see

Lambert Coal Co. v. B. & O., 257 U. S. 377;
Penn. R. R. Co. v. Puritan Coal Co., 237 U. S. 121.

VII.

Where Congress Occupies Field, Not Necessary for Commission to Act.

In

Missouri Pacific v. Porter et al.
(273 U. S. 342)

the question decided was whether the subject of regulating the provisions of bills of lading had been acted upon by the Commission in pursuance to the Act to Regulate Commerce. It was admitted that the Commission had not prescribed the form of the bill of lading, but, because Congress had occupied the field, this excluded all state authority, although the Commission had not prescribed the form, the Court, through Mr. Justice Butler, saying:

> "The question is whether Congress has entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign

vessel for ocean carriage to a nonadjacent foreign country. * * * No Act of Congress or order of the Commission prescribed a form of bill of lading for this shipment. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment or section 25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section I (in paragraph 6) extends to all carriers and to all transportation subject to the act * * *. And the Commission is empowered and directed to enforce the rule.

"* * * Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme, and, as that power has been exerted, state laws have no application. They cannot be applied, in coincidence with, as complementary to, or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

Napier v. Ry. Co., 272 U. S. 605;
Pennsylvania Co. v. Pub. Serv. Com., 250 U. S. 566;
R. R. Co. v. Varnville Co., 237 U. S. 597;
Prigg v. Pennsylvania, 16 Pet. 539;
Houston v. Moore, 5 Wheat. I, 21, 22.

In

C. R. I. & P. Ry. Co. v. Elevator Co.
(226 U. S. 426)

the Supreme Court held that, by the Hepburn Act, the delivery of cars for interstate shipment was regulated by Congress, and that the Minnesota Reciprocal Demurrage Law was void. In the course of the opinion Mr. Chief Justice White, for the Supreme Court, said:

> "In the original Act to Regulate Commerce the term 'transportation' was declared to embrace **all** instrumentalities and facilities of shipment or carriage. By the Hepburn Act it was declared that the term 'transportation'
>
> > "'shall include cars and other vehicles and **all instrumentalities and facilities of shipment or carriage**, irrespective of ownership or of any contract, express or implied, for the use thereof, and **all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.**'
>
> • • • • • • • •
>
> "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. • • • It results, therefore,

that in a case where from the particular nature of a certain subject the state may exert authority until Congress acts under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent but only permissive power."

226 U. S. 435.

In the case of

Midland Valley R. R. Co. v. Barkley et al.
(48 Sup. Ct. Rep. 342)

the Supreme Court of the United States held that an action against a railroad for damages for failure to furnish cars for use in interstate shipments of coal during a car shortage involved such an administrative question as to give the Interstate Commerce Commission exclusive jurisdiction, and jurisdiction of the state court, under Section 895, Crawford & Moses' Digest of the Statutes of Arkansas, was held superseded, although the Commission had not acted.

State legislation providing the sort of equipment to be used on locomotives engaged in interstate commerce was held invalid in the case of

Napier v. Atl. Coast Line R. R. Co.
(272 U. S. 605)

upon the ground that the Boiler Inspection Act was intended by Congress to occupy this entire field.

See, also:

Public Utilities Commission of Ohio v. Penna. R. R. Co., 151 I. C. C. 448-449.

VIII.

Commission Has Acted in Similar Cases.

Congress has not only delegated to the Commission the power to fix rates and to take into consideration the reasonableness of expenditures for labor and other operating expenses, but the Commission, in many cases, has actually entered upon the performance of this duty.

In Ex parte 74, following the enactment of the Transportation Act, the Commission entered upon the duty, imposed upon it under section 15-A of said act, of ascertaining what rates would constitute "a fair return" to the carriers in the Eastern, Southern and Western rate groups.

In considering this subject the Commission said:

> "Much has been said upon the present record concerning the necessity of additional equipment and the efficiency of the present management of the carriers. It is the view of the carriers that existing facilities are inadequate, and they state specifically that they need immediately at least 100,000 freight cars, 2,000

locomotives and 3,000 passenger cars. Shippers are unanimously of the opinion that the transportation service has been and is unsatisfactory, and many of them urge upon us the necessity of granting such increased rates as may be necessary in order that the service may be improved. Others raise the question whether considerations other than inadequacy of facilities—notably labor difficulties—are not equally responsible for the admittedly poor service. **Especially during recent months a shortage of labor at crucial points, due in part to strikes, has contributed more largely than any other single factor to the unsatisfactory condition that has existed and still exists. Witnesses for the carriers were unable to state explicitly what economies in operation, if any, may be presently effected.** On the other hand, the opinion was expressed that certain increases in operating expenses are apparently unavoidable. During the war, passenger traffic was unusually remunerative because of troop movements, elimination of unnecessary trains, and heavy loading of passenger cars. The movement of troops has practically ceased, and it is the view of the carriers that a larger number of passenger trains will have to be operated. During the war, in part because of war necessity, there was a marked increase in the loading of freight cars. **It is apparent that there may be increases in expenses not related to the general increase in prices, which may offset any economies that may be effected in other directions."**

* * * * * * *

"The probable earning capacity of the properties under particular rates prescribed by law and the sums

required to meet operating expenses, separately and collectively, are indicated in the record."

* * * * * * *

"The proposals of the carriers as originally presented and as considered throughout the hearings made no allowance for increased wages of railway employes not then effective. **In the course of the hearings it was stated that a decision of the United States Railroad Labor Board would soon be forthcoming granting certain increases in the wages of railway employes, and it was generally agreed that we should give due consideration to the award of that board when made.** On July 20, 1920, after the close of the hearings and oral argument, the Labor Board announced a decision awarding approximately $618,000,000.00 as increased wages. In discussing the results of operation in each group we shall deal first with the evidence as presented, without reference to the award of the Labor Board, and shall thereafter **refer to the wage award and to its effect upon the operating expenses of the carriers in the several groups.**"

* * * * * * *

"For the period of five years, beginning with 1912 and ending with 1916, the Eastern carriers were spending out of every dollar of operating revenue received approximately 71 cents for operating expenses. This increased to 75.03 cents in 1917, to 85.82 cents in 1918, to 88.51 cents in 1919, and to 97.68 cents in the first four months of 1920."

* * * * * * *

"It is estimated that the wage award made by the Labor Board under date of July 20, 1920, will add ap-

proximately $314,562,000.00 annually to the operating expenses of the carriers in the Eastern group. This is equivalent to 12.2 per cent of the total railway operating revenue of the Eastern carriers, as finally adjusted by them for the constructive year."

* * * * * * *

"It is estimated that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $68,598,000.00 annually to the operating expenses of the carriers in the Southern group. This is equivalent to 11.8 per cent of the total railway operating revenue of the Southern carriers as finally adjusted by them for the constructive year."

* * * * * * *

"The carriers estimate that the wage award made by the Labor Board under date of July 20, 1920, will add approximately $234,840,000.00 annually to the operating expenses of the carriers in the Western group. This is equivalent to 11.2 per cent of the total railway operating revenue of the Western carriers, as finally adjusted by them for the constructive year."

* * * * * * *

"The carriers' original petitions asked for percentage increases in freight revenue only. In their reports to us, revenue from switching and certain other special services is stated separately from freight revenue, and, therefore, accepted literally, the proposal would result in no increases on switching service."

58 I. C. C. 227, 229, 231, 233, 234, 237, 239 and 242.

In considering the question of labor as pertinent to the performance of its duty to fix remunerative rates for the carriers, the Commission, in the same case, also said:

> "To enable the carriers to meet the present situation, **every man and group of men, whether employers or employes, must realize that they are in fact performing a public service. The spirit of duty and service must actuate all.**"
>
> 58 I. C. C. 260.

In case numbered 13,623, Arkansas City Sand Co. v. Frisco Railway (102 I. C. C. 559), the Commission was called upon to consider the reasonableness of the switching rates of the Frisco road at Arkansas City, Kansas. In this connection it went fully into the cost of labor and the yard engine-hour cost for the service rendered, with the conclusion that the cost had not been sufficiently established to authorize an increase in the switching rate, the Commission concluding:

> "To arrive at the average cost per car handled in the yard during any given period, it is necessary to know the total expenses chargeable to yard switching and the total number of cars handled, both loaded and empty. No test was made to determine the proportion of the expenses chargeable to yard switching and road-haul services."

For this reason the Commission held that "the evidence is insufficient to show the nature and extent of the services

performed, * * * and the allegation of undue prejudice and preference, therefore, has not been sustained."

Arkansas City Sand Co. v. Frisco Ry., 102 I. C. C. 569, 570, 572.

In case numbered 12,066, involving the construction and repair of railway equipment by the Erie Railroad, the Commission, upon its own motion, entered upon an investigation concerning the practice of the Erie Railroad to have its equipment repaired by contractors, to whom it paid a certain per cent of profit over and above the fixed charges. The Commission found that:

> "The leasing of respondent's marine repair yard and floating equipment to a private concern, the arrangement regarding the shifting and transferring of its freight in New York Harbor and the repair of its floating equipment were not, under the circumstances, detailed in the report in the interest of efficient and economical management as required by section 15a of the act."

In the course of its opinion in this case the Commission entered into the relative cost of the service, the labor of the contractors and the practice obtaining on other roads, and concluded that the amount paid by the Erie Railroad for the repair of its equipment was neither efficient nor economical management, as required by the Transportation Act.

128 I. C. C. 323-345.

In the case numbered 16,067, known as "Maintenance of Way Expenditures of Pittsburgh & Lake Erie Railroad Company," the Commission, on January 3, 1928, denied that the practice of the Pittsburgh & Lake Erie Railroad, in paying to labor contractors for their services in connection with the employment of maintenance of way laborers, an allowance of 10 per cent of the monthly earnings of its track and roadway laborers, including supervisory and camp and commissary employes, was not consistent with "efficient and economical management." The Commission went into the cost of labor paid by the contractors, and assumed full jurisdiction and power over the expenditures made by the respondent through its contractors to its maintenance of way laborers. The Commission, in the course of its opinion, said:

> "Our investigators show a net loss to respondent of $611,268.00. They applied railroad rates to the service hours performed on track and roadway by contract forces and compared the results with the total cost to respondent for contractor's services, exclusive of wages of track and roadway foremen and compensation insurance, which items respondent would have borne had it carried the men on its own roll."
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> * * * * * * *
>
> "Whatever may have been the justification for such an arrangement in the beginning under conditions which then existed, the facts of record do not justify its continuance."
>
> 136 I. C. C. 527-537.

This Court will take judicial notice of the fact that after the passage of the Transportation Act, the Interstate Commerce Commission, of its own initiative and pursuant to the jurisdiction vested in it by paragraph 21, instituted its proceeding No. 14,489 and issued an order therein as follows:

> **"In re Adequacy of Locomotives and Cars Owned by Common Carriers Used in the Transportation of Freight.**
>
> "The Commission, having under consideration the question of the **adequacy of the supply of locomotives and freight cars owned or used by each common carrier by railroad in continental United States, subject to the Interstate Commerce Act:**
>
> "It is ordered that the Commission, upon its own motion, and without complaint, enter upon a proceeding of investigation into and concerning the adequacy of the locomotives and cars of all descriptions owned and of the locomotives and cars used by each such common carrier by railroad and used in the transportation of freight between points in continental United States and into and concerning the customs and practices prevailing or desirable with respect to the ownership, use, and interchange of cars, with a view of promoting economical and efficient service, to prescribing and establishing such just and reasonable rules, regulations and practices with respect to car service, and to require the respondents to provide themselves with such safe and adequate locomotives and cars wherewith they perform as common carriers their car service as may upon such investigation appear to be contemplated and required by law.

"It is further ordered, that each common carrier by railroad, respondent herein, furnish the Commission the information called for in appendices "A" to "R", inclusive hereto, not later than February 1, 1923.

"It is further ordered that all carriers by railroad subject to the Interstate Commerce Act be and they are hereby made respondents to this proceeding; that a copy of this order be served upon each respondent; that the respective states be notified of this proceeding by sending copies of this order by registered mail to the Governor of each state, as well as to the tribunal thereof, if any, having regulatory powers over common carriers by railroad. * * *

"It is further ordered that this proceeding be assigned for hearing at such times and places as the Commission may hereafter direct."

It thus appears from this order of the Commission that the Commission has actually entered upon the duty of regulating the supply of cars, and seeing to it that the common carriers of the United States furnish an "economical, efficient" and a "safe and adequate car service" for the benefit of the public, and this in the face of the opinion of the three-judge court in this case that Congress has not vested the Commission with any jurisdiction or power to regulate the "practice" governing car service.

IX.

Railroad Labor Act.

Congress has also legislated completely upon the subject of railway labor, by providing for a Board of Media-

tion and an Emergency Board, if necessary, to determine all disputes and issues between railroad employes and the common carriers of this country.

44 Stat. 577, 578, 580, 582, 585 and 587.

The Railroad Labor Act provides that it shall be the duty of all carriers, their officers, agents and employes, to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and **working conditions**, and to settle all disputes. Conferences are provided for "in case of a dispute between a carrier and its employes arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, **rules or working conditions.**"

Congress, by the Railroad Labor Act, has given the Railroad Labor Board jurisdiction under certain conditions to determine any and all disputes submitted, and not only to prescribe reasonable rules, but to determine what are proper "working conditions" between railroad employes and common carriers.

If Congress, under the commerce clause of the Constitution, has delegated to the Railway Labor Board, when called upon, power over the subject matter of what are reasonable rules for the operation of railroads, and regarding agreements, and the working conditions of employes, then state authority ceases upon the subject matter.

In the recent case of

Texas & New Orleans R. Co. v. Railway Clerks
(281 U. S. 548)

Mr. Chief Justice Hughes, in summing up the comprehensive character of the Railway Labor Act of May 20, 1926 (44 Stat. 577), said:

> "It is unnecessary to review the history of the legislation enacted by Congress in relation to the settlement of railway labor disputes, as earlier efforts culminated in Title III of the Transportation Act, 1920 (c. 91, 41 Stat. 456, 469), the purpose and effect of which have been determined by this Court. In **Pennsylvania Railroad Company v. United States Railroad Labor Board**, 261 U. S. 72, the question was whether the members of the Railroad Labor Board as constituted under the provisions of the Transportation Act, 1920, had exceeded their powers. The Court held that the Board had jurisdiction to hear and decide a dispute over rules and working conditions upon the application of either side, when the parties had failed to agree and an adjustment board had not been organized.
>
> * * * * * * *
>
> "The bill was introduced as the result of prolonged conferences between representative committees of railroad presidents and of executives of railroad labor organizations, and embodied an agreement of a large majority of both. The provisions of Title III of the Transportation Act, 1920, and also the Act of July 15, 1913 (c. 6, 38 Stat. 103), which provided for mediation, conciliation and arbitration in controversies with railway employes, were repealed.
>
> "While adhering in the new statute to the policy of providing for the amicable adjustment of labor dis-

putes, and for voluntary submissions to arbitration as opposed to a system of compulsory arbitration, Congress buttressed this policy by creating certain definite legal obligations. The outstanding feature of the Act of 1926 is the provision for an enforceable award in arbitration proceedings. The arbitration is voluntary, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted (Section 9).

* * * * * * *

"Another definite object of the Act of 1926 is to provide, in case of a dispute between a carrier and its employes which has not been adjusted under the provisions of the act, for the more effectual protection of interstate commerce from interruption to such a degree as to deprive any section of the country of essential transportation service (Section 10).

* * * * * * *

"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employes, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings.

* * * * * * *

"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employes to make every reasonable effort to enter into and maintain agreements concerning **rates of pay, rules and working conditions**, and to settle disputes with all expedition in conference between

authorized representatives, but added this distinct prohibition against coercive measures. This addition cannot be treated as superfluous or insignificant, or as intended to be without effect (**Ex parte Public National Bank**, 278 U. S. 101, 104).

* * * * * * *

"The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties.

* * * * * * *

"We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement' (**The Daniel Ball**, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (**County of Mobile v. Kimball**, 102 U. S. 691, 696, 697); to 'foster, protect, control and restrain' (**Second Employers' Liability Cases**, 223 U. S. 1, 47). Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures."

When Congress, in 1920, specifically delegated to the Interstate Commerce Commission complete power to prescribe "safe and adequate" and to regulate "the supply of trains," and by the Labor Act of 1926 has thus definitely

empowered the United States Railroad Labor Board to fix and determine "rules and working conditions" in all the different branches of the service between common carriers by railroad and their employes, we submit that such state legislation as the Arkansas Extra Brakeman and Extra Switchman Laws are inconsistent with the exercise of this delegated power to these administrative branches of the Federal Government.

X.

Decisions of Supreme Court Upholding Arkansas Laws.

The decisions of the Supreme Court of the United States upholding the Arkansas Extra Brakeman and Extra Switchman Acts,

C. R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453;
St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S 518,

were handed down, respectively, February 20, 1911, and April 3, 1916.

This was several years before the Transportation Act of 1920, which, the Supreme Court now holds, was intended to, and did, occupy the entire field of regulation of interstate carriers. No contention was made in the above cases that Congress had then acted upon the subject.

The definition of "Car Service" to include "and the supply of trains" was amended for the first time in the Transportation Act of 1920 (41 Stat. L. 476). The term

"Car Service," as it appeared in the Esch Car Service Act of May 29, 1917 (40 Stat. L. 101); did not include "the supply of trains," but only included "the movement, distribution, exchange, interchange and return of cars used in the transportation of property by any carrier subject to the provisions of this act." In other words, the right of the Commission to regulate "the supply of trains" had not been included in the congressional legislation prior to the Transportation Act of 1920, and such power had not been conferred upon the Commission when the Arkansas Extra Brakeman and Extra Switchman Acts were before this Court and considered in the decisions upholding the legality of those statutes.

The provision of the Arkansas Extra Brakeman Law, that the law should not apply **"where said freight train, so operated, shall consist of less than twenty-five cars,"** in view of the modern improvements and methods of railroading, is so archaic and unreasonable that, upon this ground alone, in view of the provisions of the Transportation Act and the improvement in railroad practices and safety measures since those decisions were rendered, should clearly distinguish those decisions; but the Court, in those cases, has itself drawn the distinction between the conditions then existing and those now obtaining. Mr. Justice Harlan, in the **Rock Island** case (219 U. S. 453), uses the following language:

> "Under the evidence, there is admittedly some room for controversy as to whether the statute is, or was,

necessary; but it cannot be said that this was so unreasonable as to justify the Court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which, evidently, the State Legislature had in view. It is the means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts if they have a real relation to that object.

* * * * * * *

"Undoubtedly, Congress, in its discretion, may take charge of the whole subject of the equipment of interstate cars and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce; **but it has not done so in respect of the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations upon that subject, and, until it does, the statutes of the states, not in their nature arbitrary, and which really relate to the rights and duties of all within its jurisdiction, must control**" (219 U. S. 466).

In other words, the very condition which was absent at the time that the above decision was rendered, i. e., the fact that Congress had not taken "**entire charge of the whole subject,**" does exist at the present time.

Congress has now legislated upon the whole field and delegated to one central body, outside the State of Arkansas, the regulation of "**the whole subject of the equipment of interstate cars,**" and, by doing so, according to the deci-

sion of Justice Harlan in the **Rock Island** case, the power of the state to legislate upon the same subject terminated.

If a given state, since the Transportation Act, can adopt regulations affecting freight trains transporting interstate commerce and containing over twenty-five cars, then it can impose such regulations upon trains containing five or ten cars, and this would be just as reasonable as the present regulation which affects trains of twenty-five cars.

According to the affidavits filed in this case, the average freight train in Arkansas and other states contains from fifty to seventy-five cars, and, with the modern power brakes and other appliances, any arbitrary conditions imposed upon trains containing only twenty-five cars or less are clearly unreasonable.

In the **Iron Mountain** case (240 U. S. 518), wherein the Supreme Court upheld the Arkansas Full Switching Crew Law, the Supreme Court, speaking through Mr. Justice McKenna, said, referring to the previous **Rock Island** case, upholding the validity of the Extra Brakeman Act:

> "In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power.
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> • • • • • • •
>
> "A more serious objection is that certain terminal companies, one at the City of Helena and one at Fort Smith, do switching for certain connecting trunk lines,

and yet, by reason of their length being less than one hundred miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitrary, if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary.

"We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will, as a whole, fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant" (240 U. S. 521).

As said by Justice Harlan in the **Rock Island** case:

"Undoubtedly, Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars."

Since those decisions were rendered Congress has done so.

The subsequent action of Congress completely removes the reasons upon which these decisions are based. The supreme legislative power had not acted upon the subject upon which the subordinate legislative power had legislated when those decisions were rendered.

The height of oppression, which the rigor of the Arkansas statutes resulted in, was, no doubt, one reason which

prompted Congress to take over the subject matter and provide for the more reasonable rule which now obtains.

In any event, the condition confronting the Court, when these decisions were rendered, no longer obtains, and, exit the reason therefor, those decisions should not longer be held controlling upon the courts.

CONCLUSION.

In conclusion, the state laws complained of attain no useful or beneficial result; they constitute an unreasonable and unjust burden upon interstate commerce and a violation of the Fourteenth Amendment; are inconsistent with Sections 1, 13, 15 and 15a of the Act to Regulate Commerce, and with the general plan and objects of the Transportation Act of 1920, and the Railroad Labor Act of 1926, and the further enforcement of said Arkansas Extra Brakeman and Extra Switchman Laws should be restrained.

Respectfully submitted,

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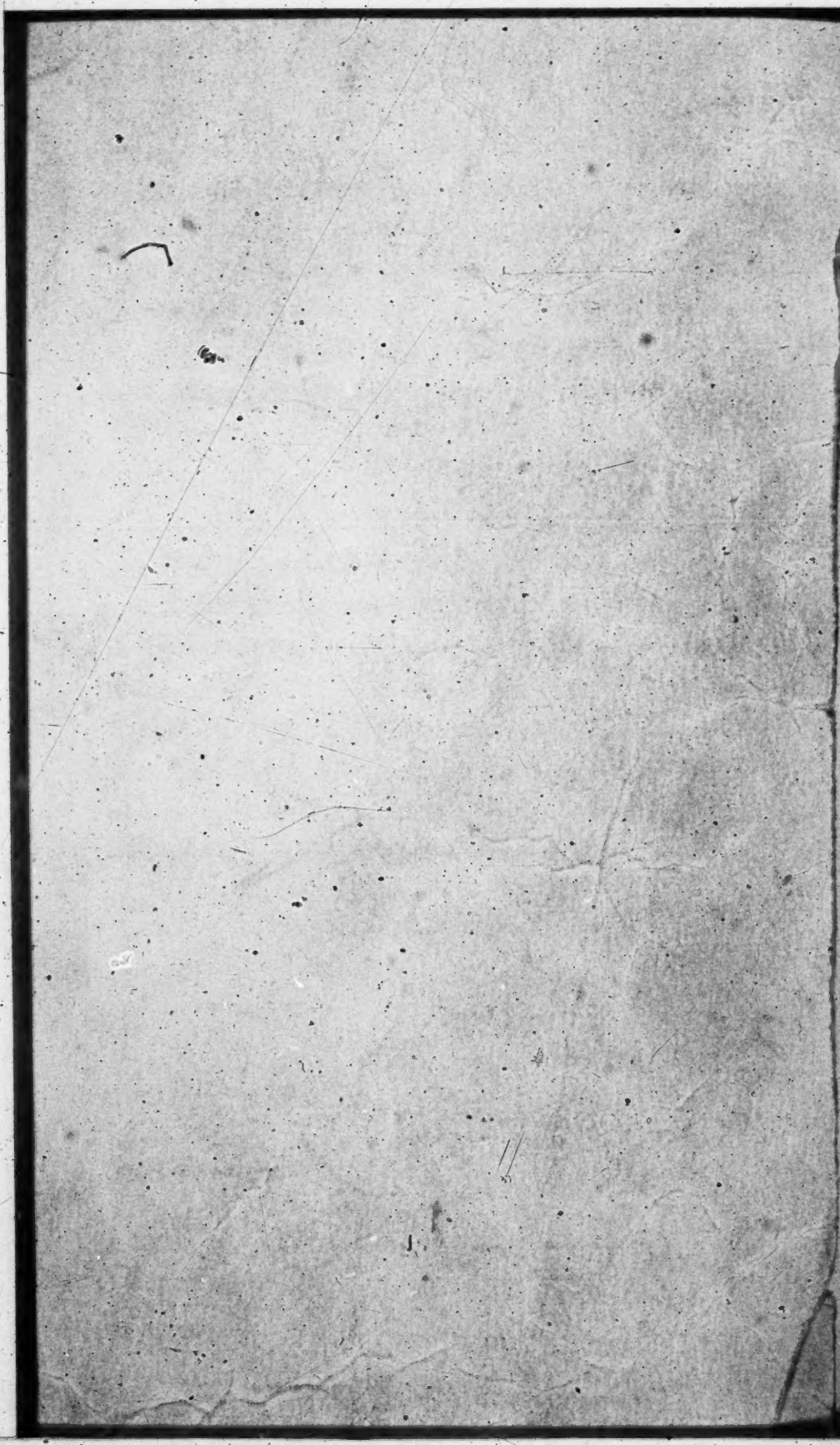

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,
vs.
HAL NORWOOD, Attorney-General of the State of Arkansas; JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, et al., Etc.,
Appellees.
No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S REPLY BRIEF.

THOMAS B. PRYOR,
EDWARD J. WHITE,
Counsel for Appellant.

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Allegations of Complaint.

Appellees, in their reply brief (pp. 3-5), state that the appellant has confused allegations of the petition with statements to be found in the affidavits and not in the bill of complaint.

Appellees admit, however, that the petition did contain the allegations that, since the enactment of the Arkansas Full Crew and Full Switching Crew Laws, the appellant's

> "road and equipment is now heavier and stronger and safer; that freight trains 'containing many more cars than those which could be safely operated when said laws were enacted can now be operated in Arkansas, and throughout the United States generally, much more safely than smaller trains could then be operated'; that additions and betterments have been made for the express purpose of increasing efficiency and safety 'in the running of longer and heavier freight and passenger trains' ";

and that

> "it is standard practice, wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen and extra brakemen provided by the Arkansas laws" (Appellees' Brief, pp. 3 and 4).

Clearly, under the authorities cited, these facts, upon which appellant predicated the conclusion that its rights under the Transportation Act, the Federal Railroad Labor Act of 1926 and the Constitution of the United States were violated, would be admitted by the appellees' motion to dismiss, and, hence, it was error for the three-judge Court to sustain said motion.

In passing, the three-judge Court held against the appellees upon the contention that this was a suit against the State of Arkansas in contravention of the Eleventh Amendment; that the complainant had an adequate remedy at law, and that it was necessary in the first instance to appeal to the Interstate Commerce Commission before filing this bill in court. Notwithstanding this fact, however, appellees have again raised these points before this court.

Appellees also contend that the decisions of this Court (**C. R. I. & P. v. Arkansas, 219 U. S. 453**, and **St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518**), upholding the validity of the Arkansas Full Crew Law and the Arkansas Full Switching Crew Law, were res adjudicata and conclusive upon the three-judge Court, although the Transportation Act was not in effect when these decisions were rendered.

For the first time, in 1920, Congress, in the Car Service Section of the Interstate Commerce Act, granted to the Interstate Commerce Commission **jurisdiction to regulate the supply of trains.** Since this grant of power the Interstate Commerce Commission has held that it had exclusive jurisdiction "to regulate the supply of trains," and neither this grant of power nor the exercise thereof by the Interstate Commerce Commission existed or had been exercised until after these decisions.

In re Train Service on Northern Pacific, 112 I. C. C. 191.

Three-Judge Court Erred in Sustaining the Motion to Dismiss.

In Postal Telegraph Cable Co. v. Newport (247 U. S. 464), after the telegraph company, under authority of an ordinance of the City of Newport, Kentucky, had erected its poles and wires over the streets and alleys of that city, upon the nonpayment of certain taxes, suit was filed by the city to recover the license taxes, and judgment was rendered for the city, notwithstanding the allegation of certain facts set up by the defendant and rights based upon the provisions of the Constitution of the United States, and its contention that the ordinance, in imposing such taxes, violated the commerce clause of the Constitution and the establishment of post offices and post roads, and denied to it the equal protection of the law in violation of the Fourteenth Amendment.

The case was decided in the trial court upon the pleadings and exhibits, which later included a copy of the ordinance.

In deciding the case the Court of Appeals of Kentucky (160 Ky. 244) ignored the facts alleged as a basis for the contention that the telegraph company had been denied the benefit of the state and federal Constitutions, and decided in favor of the city.

Mr. Justice Pitney, for this Court, said:

> "But the question arises whether the basis of fact upon which the state court rested its decision denying

the asserted federal rights has any support in the record, for, if not, it is our duty to review and correct the error."

Sou. Pac. v. Schuyler, 227 U. S. 601;
N. Car. v. Zachary, 232 U. S. 248;
Carlson v. Curtis, 234 U. S. 103;
Norfolk & Western R. Co. v. W. Va., 236 U. S. 605.

Proceeding to hold that it was error to thus ignore the facts alleged upon which the constitutional right was predicated, this Court said:

"Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it and erected its poles and strung its wires in the streets of the city under another and independent claim of right, as plaintiff well knew, and other averments bearing upon the question of acceptance in fact."

Postal Telegraph Cable Co. v. Newport, 247 U. S. 474.

And see:

Georgia Power Co. v. Decatur, 281 U. S. 505;
Chicago Junction case, 264 U. S. 262.

State Full-Crew Laws.

In the brief for appellees the statement is made that the Arkansas law is **"not an exceptional law,"** but that the object of the appellant's bill is to bring about an annulment by judicial action of **"state legislation enacted and sustained under the police power to protect the public safety and welfare"** (Appellees' Brief, p. 2).

That there is no uniformity or consistency in the state legislation regarding "Full-Crew Laws" will be evident from a perusal of the state laws upon the subject which are collated in the appendix to the appellees' brief (pp. 88 to 93).

Full-Crew Legislation.

Counsel for appellees refer to the number of states that have adopted full-crew legislation since the decision of this Court upholding the Arkansas Full-Crew Law.

This Court will take judicial notice of the history of state legislation regarding extra brakemen on freight trains in the United States. The following is a brief history of such legislation:

Brief History of State Full-Crew Legislation.

During the years 1911 to 1914, after the decision of the Supreme Court of the United States in C. R. I. & P. v. Arkansas, 219 U. S. 453, upholding the Arkansas Full-Crew Law, a wave of full-crew legislation swept over the

country, and by the end of 1914 such laws in one form or another appeared on the statute books of twenty-one states.

In some states the Public Utilities Commission was authorized to prescribe the number of employes, and in others five employes, that is, two brakemen only, were required. In certain other states, however, three brakemen were required on trains of varying length.

A list of such states and the minimum number of cars to which the requirement applied is as follows:

Arkansas, New York and Washington	25 cars or more
Maryland, New Jersey and Pennsylvania	30 cars or more
Arizona and Oregon	40 cars or more
North Dakota	46 cars or more
California, Nevada and Indiana	50 cars or more

In North Dakota one additional brakeman was required for every 10 cars or fraction thereof over 45 cars.

In California the number of additional brakemen required on trains of 50 cars or over was dependent on a combination of the number of cars over 50 and the maximum grade of the track over which the trains were operated.

Attempts were also made and are still being made to enact such laws in a large number of other states, but no such law has been enacted since 1914. The Indiana and

Pennsylvania laws were repealed in 1921 and in 1922 the Maryland and New Jersey laws were repealed.

The Missouri Legislature passed a full-crew law in 1913, but the same was overwhelmingly defeated on a referendum at the general election held in November of the next year.

In Connecticut the Legislature referred proposed full-crew legislation to the Public Utilities Commission for investigation and report, and the Commission, in 1914, reported against the proposed law.

Governor Cruce of Oklahoma vetoed the law passed by the Legislature of that state in 1913, and Governor Foss of Massachusetts took the same action in 1912.

Accident Bulletin No. 97 for the year 1928, published by the Interstate Commerce Commission, shows the following figures with reference to man hours worked by conductors and trainmen (brakemen and flagmen) on through and local freight trains:

	Conductors	Trainmen
Local freight trains	28,109,000	67,925,000
Through freight trains	36,580,000	77,510,000

This shows that for every conductor there are about 2.1 trainmen on through freight trains and on local freight trains there are about 2.4 trainmen for each conductor. It thus appears that the standard crew on freight trains consists of a conductor and two trainmen except in localities where state laws require an extra brakeman on through

freight trains and in cases in which a third man is required to assist in loading and unloading less-than-carload freight on local trains in territory where a third man is not required by law to be used.

Plaintiff Has No Adequate Remedy at Law.

The case of

Ex Parte Young, 209 U. S. 123,

and cases following it are direct authorities upon the proposition that an action, such as the plaintiff's, will lie to restrain the enforcement of a void state law, because the state procedure, of defending such statutes and appealing through the state courts, and then attempting to take the case to the United States Supreme Court, is not an adequate remedy.

In

Ex Parte Young, 209 U. S. 163,

the Supreme Court said:

> "It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But, in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an

inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

The statutes involved in the **Young** case provided for both fine and imprisonment, and the Court went on to observe that it might be difficult to find some agent who would want to run the risk of imprisonment, and then continued:

"If, however, one should be found and the prosecutor should elect to proceed against him, **the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter.** * * * We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (**St. Louis & G. Ry. Co. v. Gill, 156 U. S. 649**), but **the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.**"

In

Risty v. C. R. I. & P. Ry. Co., 297 Fed. 710,

it was also contended that the plaintiff had an adequate remedy in the state courts and that, for this reason, jurisdiction should not be entertained; but the United States Circuit Court of Appeals for the Eighth Circuit, in disposing of this contention, said:

> "Appellants challenge the jurisdiction of the Court, claiming there was a plain, adequate and complete remedy at law; that there was no equity in the bill; that action was premature, and that the necessary jurisdictional amount was not involved. These in their order.
>
> "It is fundamental that equity cannot give relief where there is a plain, adequate and complete remedy at law. It is provided by the Federal Judicial Code, Compiled Stat. 1918, Sec. 1244, as follows: 'Suits in Equity—Suits in equity shall not be "sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law (R. S., Sec. 723, March 3, 1911, c. 231, Sec. 267, 36 Stat. 1163)." It must be a remedy as certain, complete, prompt and efficient to attain the ends of justice as that in equity' (citing authorities).
>
> **"It must be a remedy on the law side of the federal court.** A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy (citing authorities). The question is: **Has the party adequate remedy at law in the federal court?"**

The judgment of the Circuit Court of Appeals for the Eighth Circuit in that case was reviewed by the Supreme Court in 270 U. S. 328, where the Supreme Court said:

> "The remedy by appeal to a state court * * * does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."

To the same effect was the case of

Franklin v. Nevada-California Power Co.
264 Fed. 843,

where the Circuit Court of Appeals for the Ninth Circuit said:

> "The adequate remedy at law, which is the test of equitable jurisdiction in the federal courts, must exist in those courts. The fact of the existence of such a remedy in a state court is immaterial."

Plaintiff Does Not Have to Exhaust the State Procedure by Appealing From Prosecutions in the Justices' Courts Through the Different Courts of the State of Arkansas to the Supreme Court Before Resorting to a Federal Court of Equity.

The second ground of the motion to dismiss is that plaintiff cannot enjoin the enforcement of the criminal statutes of the State of Arkansas without first exhausting its remedy by appeal under the state practice.

The same contention was made in the recent case of

Hill City Ry. Co. v. Youngquist, Attorney-General of Minnesota, 32 Fed. (2d) 821,

where Circuit Judges Booth, Cant and Sanborn, in a per curiam opinion, thus replied to this contention:

> "Another point raised by the motion is that the complaint shows that plaintiff has an adequate remedy at law. **The adequate remedy at law must be in the federal court. None is pointed out and, in our opinion, none such exists.**"

In the **Hill City** case the railroad company had appealed from an order of the Railroad and Warehouse Commission to the State District Court, and it was contended that the federal court should not grant an injunction restraining the enforcement of the statute until this appeal had been finally disposed of. In answering this contention the Court for the Eighth Judicial Circuit said:

> "Finally, the point is made that an appeal has been taken by the plaintiff company from the order of the Railroad and Warehouse Commission to the State District Court, and that, by doing so, plaintiff company has estopped itself from bringing the present suit in the federal court."

The Court held that by appealing from the order of the Railroad and Warehouse Commission there was no estoppel against the plaintiff from the prosecution of its suit in the federal court.

In

Union Light & Power Co. v. Railroad Commission,
17 Fed. (2) 146,

the defendants contended that the plaintiff would have to continue to prosecute its appeal from a case pending to enforce the statute in the Circuit Court of Campbell County, Kentucky. Upon this contention the Court said:

> "We cannot agree with defendant's contention that this Court, under Section 266 of the Judicial Code, has no authority to proceed further until a suit now pending in the Campbell County (Kentucky) Circuit Court, which was instituted by the Railroad Commission to enforce the orders complained of herein, has been finally determined."
>
> • • • • • • •
>
> "The section in question, however, grants to any of the judges authorized to sit in such case the power to grant, without notice or hearing, a temporary restraining order at any time before the hearing and determination of the application for an interlocutory injunction."
>
> • • • • • • •
>
> "We, therefore, hold that the action brought by the defendants in the Campbell Circuit Court, and the order entered therein, in nowise affects the power or the duty of this Court to now proceed to a final determination of the application for an interlocutory injunction herein."

17 Fed. (2d) 147.

In

Franklin v. Nevada-California Power Co.,
264 Fed. 643,

the Court held that an adequate remedy at law, which was the test of equitable jurisdiction in the federal courts, must exist in those courts, and the fact that there might have been some other remedy in the state courts was immaterial.

In

Risty v. C. R. I. & P. Co., 297 Fed. 710,

the Circuit Court of Appeals for the Eighth Circuit said:

> "It must be a remedy on the law side of the federal court. A remedy in the state court that cannot be pursued in the federal court is not an adequate remedy. * * * The question is: Has the party the adequate remedy at law in the federal court?"

In the **Risty** case the United States Supreme Court reviewed the judgment of the Court of Appeals for the Eighth Circuit and said:

> "The remedy by appeal to a state court, under section 8469, does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law

side of that court, and not the inadequacies of the remedies afforded by the state courts."

270 U. S. 328.

This same contention is answered in the **Young** case, supra, where the Supreme Court said:

"Several years might elapse before there was a final determination of the question, and, if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery."

209 U. S. 163.

See, also:

St. Louis etc. Ry. Co. v. Gill, 156 U. S. 649.

That this is not a suit against the State of Arkansas, in violation of the Eleventh Amendment, should be apparent under the decisions of this and other courts.

This Is Not a Suit Against the State of Arkansas.

The defendants, in their motion to dismiss the complaint, assert that this action is against the State of Arkansas, in violation of the Eleventh Amendment to the Constitution of the United States, which prevents any suit in law or in equity against one of the United States by citizens of another state.

The same contention was made by a motion to dismiss in the recent case of

Hill City Ry. Co. v. Youngquist, Attorney-General of Minnesota et al., 32 Fed. (2d) 819.

The Attorney-General, in that case, filed a motion to dismiss, which was heard by Circuit Judge Booth and District Judges Cant and Sanborn, and the Court, in a per curiam opinion, answered the same propositions advanced by the defendants in this case, as follows:

"We think that these contentions, under the motion to dismiss, are based upon a misconception of the bill of complaint. The gist of the bill is that the sections of the Minnesota statute above cited, together with the order of the Railroad and Warehouse Commission, as construed by the state officials, defendants herein, are violative of the rights of plaintiff secured by the Fourteenth Amendment, as properly construed, and that the threatened action by defendants against plaintiff are also violative of plaintiff's rights under such amendment. It is clear that a federal question or federal questions are thus presented. * * * The United States District Court, accordingly, has jurisdiction."

Hill City Ry. Co. v. Youngquist, 32 Fed. (2d) 821;
Ex Parte Young, 209 U. S. 123;
Siler v. L. & N. R. R. Co., 213 U. S. 175;
Washington ex rel. v. Fairchild, 224 U. S. 510;
Railroad Commission v. Eastern Texas Ry. Co., 264 U. S. 79;
Brownwood etc. Ry. Co. v. Commission (D. C.), 16 Fed. (2d) 297.

See, also,

Union Light & Power Co. v. R. R. Comm'n of Kentucky, 17 Fed. (2d) 143,

and cases cited.

In

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 66,

the contention was made that the Circuit Court of Mississippi had no jurisdiction to issue the injunction, but the Supreme Court, speaking through Justice Shiras, said:

> "We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In the recent case of

White v. Federal Radio Commission et al., 29 Fed. (2d) 113,

where the plaintiff sought an injunction against the en-

forcement of an order of the Federal Radio Commission on the ground that the Radio Act of 1927 was unconstitutional, upon a motion to dismiss because the suit, in effect, was one against the United States, Judge Wilkerson, speaking for the Court for the Northern District of Illinois, said:

> "In a strict sense the Court, in this case, has jurisdiction. It has power to grant an injunction, and if one is granted, its decree, even though it may be erroneous, would not be void. The motion of the defendants to dismiss for want of jurisdiction in equity will be overruled.
>
> "It is no longer open to denial that the averments of the unconstitutionality of the statute, which are relied upon, if well founded, justify equitable relief under the bill."

Kennington v. Palmer, 255 U. S. 100;
Adams v. Tanner, 244 U. S. 590;
Hammer v. Dagenhart, 247 U. S. 251;
Hamilton v. Kentucky Distilleries, 251 U. S. 146;
Ruppert v. Caffey, 251 U. S. 264;
Ft. Smith & Western R. R. Co. v. Mills, 253 U. S. 206.

In

Pennsylvania v. West Virginia, and Ohio v. West Virginia, 262 U. S. 553,

a statute of West Virginia provided that persons engaged in furnishing natural gas must furnish all the gas the do-

mestic consumers were ready to pay for before transporting it by pipe line to other states.

It was alleged that the Corporation Commission would order a physical connection for domestic consumers, and that a company failing to furnish such gas would be subject to the penalties provided by the act.

The Supreme Court held that the statute was void, and granted the injunction to relieve against the penalties provided for its violation.

Since the leading case of

Ex Parte Young, 209 U. S. 124,

it has been generally recognized that the Attorney-General could not claim exemption, when he was attempting to enforce a void statute, by hiding behind the Eleventh Amendment to the Federal Constitution. In that case Edward T. Young, Attorney-General of the State of Minnesota, was attempting to enforce the minimum-rate statutes of the State of Minnesota, and the United States Circuit Court enjoined him and the Railroad Commission from proceeding to enforce the Minnesota law.

He appeared specially and only for the purpose of moving to dismiss the bill against him on the ground that the Court had no jurisdiction over him, as Attorney-General; that the State of Minnesota had not consented, and did not consent, to the commencement of the suit, and that the suit was, in fact, a suit against the State of Minnesota,

contrary to the Eleventh Amendment to the Constitution of the United States.

Upon hearing, the Circuit Court of Minnesota enjoined Young, pending the final hearing of the case, from taking or instituting any action or proceeding to enforce the penalties provided by statute.

The Attorney-General proceeded to procure mandamus in the state court the day after the granting of the preliminary injunction, and he was then cited for contempt of the federal court. He set up the same defenses in his answer and claimed that the State of Minnesota was exempt from the suit under the Eleventh Amendment to the Constitution of the United States.

Mr. Justice Peckham, in the **Young** case, reviewed the authorities at length, and came to the conclusion that the action in that case was not a suit against the state in its sovereign capacity, but was against the defendants, who were wrongfully attempting to enforce a void statute. In the course of the opinion Justice Peckham, speaking for the Court, said:

> "In **Virginia Coupon Cases**, 114 U. S. 270, 296 **(Poindexter v. Greenhow)**, it was adjudged that a suit against a tax collector who had refused coupons in payment of taxes and, under color of a void law, was about to seize and sell the property of a taxpayer for nonpayment of his taxes, was a suit against him personally, as a wrongdoer, and not against the state."

* * * * * * *

"In **Pennoyer v. McConnaughy**, 140 U. S. 1, 9, a suit against land commissioners of the state, was said not to be against the state, although the complainants sought to restrain defendants, officials of the state, from violating, under an unconstitutional act, the complainants' contract with the state, and thereby working irreparable damage to the property rights of the complainants. **Osborn v. United States Bank**, supra, was cited, and it was stated:

"'But the general doctrine of **Osborn v. Bank of the United States**, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when, to execute it, would violate rights and privileges of the complainant, which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.'

"The same principle is decided in **Scott v. Donald**, 165 U. S. 58, 67. And see **Missouri etc. v. Missouri Railroad Commission**, 183 U. S. 53.

* * * * * * *

"In **Smyth v. Ames**, 169 U. S. 466 (another rate case), it was again held that a suit against individuals for the purpose of preventing them, as officers of the state, from enforcing, by the commencement of suits or by indictment, an unconstitutional enactment to the injury of the rights of the plaintiff, was not a suit against the state within the meaning of the amendment. At page 518, in answer to the objection that the suit was really against the state, it was said:

"'It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing

them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of the amendment.' * * *

"* * * This decision was reaffirmed in **Prout v. Starr**, 188 U. S. 537, 542."

* * * * * * *

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the federal Constitution, may be enjoined by a federal court of equity from such action."

209 U. S. 151 to 158.

In the **Young** case, the Attorney-General also contended that it was not his specific duty to enforce the statute and that, therefore, he should not have been made a party defendant. Upon this question the Court said:

"The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not

affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official, in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the State Attorney-General seeks to enforce be a violation of the federal Constitution, the officer, in proceeding under such enactment, comes into contact with the superior authority of that Constitution, and he is, in that case, stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. (See **In re Ayres**, supra, p. 507.) It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the federal Constitution, be first raised in a federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it to the exclusion of all other courts."

Ex parte Young, 209 U. S., l. c. 159, 160.

The **Young** case is followed in

Cline v. Frink Dairy Co., 274 U. S. 446,

where Mr. Chief Justice Taft held that:

"The general rule is that a federal court of equity may enjoin state criminal proceedings under a statute alleged to be unconstitutional when their prevention is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate."

In addition to the **Young** case, the Court cites:

Fenner v. Boykin, 271 U. S. 240;
Packard v. Banton, 264 U. S. 140;
In re Sawyer, 124 U. S. 200.

The **Young** case is again followed in the recent case of

Liggett v. Baldridge, Attorney-General of Pennsylvania, 278 U. S. 106,

where an injunction against the Attorney-General was held to be authorized, to prevent him from enforcing the Pennsylvania statute forbidding any corporation to own a pharmacy or drug store, in addition to those owned at the time of its enactment, unless all of its stockholders were licensed pharmacists.

Replying to the contention that this was a suit against the state which could not be maintained Mr. Justice Sutherland, for the Supreme Court, said:

"It further appears that the State Attorney-General and the District Attorney of the proper county have

threatened and intend to and will prosecute appellant for its violation of the act, the penalties for which are severe and cumulative."

Appellees also raised the question that, before invoking the jurisdiction of the courts, appellant must, as a condition precedent, invoke the jurisdiction of the Interstate Commerce Commission.

Where Congress Occupies Field Not Necessary for Commission to Act.

In

Missouri Pacific v. Porter et al.
(273 U. S. 342)

the question decided was whether the subject of regulating the provisions of bills of lading had been acted upon by the Commission in pursuance to the Act to Regulate Commerce. It was admitted that the Commission had not prescribed the form of the bill of lading, but, because Congress had occupied the field, this excluded all state authority, although the Commission had not prescribed the form, the Court, through Mr. Justice Butler, saying:

"The question is whether Congress has entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property received by them for transportation over an interstate inland route to a seaport for delivery to a foreign vessel for ocean carriage to a nonadjacent foreign country.

* * * No Act of Congress or order of the Commission prescribed a form of bill of lading for this shipment. The defendants in error rightly say that the Carmack Amendment, the Cummins Amendment or section 25 does not apply to such a shipment. But that does not sustain their contention that Congress has not evinced an intention to regulate bills of lading for transportation such as is here involved. Section I (in paragraph 6) extends to all carriers and to all transportation subject to the act * * *. And the Commission is empowered and directed to enforce the rule.

"* * * Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme, and, as that power has been exerted, state laws have no application. They cannot be applied, in coincidence with, as complementary to, or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

Napier v. Ry. Co., 272 U. S. 605;
Pennsylvania Co. v. Pub. Serv. Com., 250 U. S. 566;
R. R. Co. v. Varnville Co., 237 U. S. 597;
Prigg v. Pennsylvania, 16 Pet. 539;
Houston v. Moore, 5 Wheat. I, 21, 22;
C. R. I. & P. Ry. Co. v. Elevator Co., 226 U. S. 426, 435.

In the case of

Midland Valley R. R. Co. v. Barkley et al.
(48 Sup. Ct. Rep. 342)

the Supreme Court of the United States held that an action against a railroad for damages for failure to furnish cars for use in interstate shipments of coal during a car shortage involved such an administrative question as to give the Interstate Commerce Commission exclusive jurisdiction, and jurisdiction of the state court, under Section 895, Crawford & Moses' Digest of the Statutes of Arkansas, was held superseded.

In deciding that case Mr. Justice Brandeis said:

> "The assertion that no administrative question is here involved rests upon a misapprehension. It may be assumed that there was **no order of the Commission** which required the Midland to distribute all available open-top cars among the tipple mines. But the reasonableness of the Midland's practice in doing so and in allotting box cars to the wagon mines was the substantial matter in controversy. * * * **The reasonableness of the rule adopted by the carrier is a matter for the Commission.**"

Appellees also contend that the decisions of this Court, upholding the Arkansas Full-Crew and Full-Switching-Crew Laws, prevent this Court from now reviewing the subject, notwithstanding Congress had not then occupied the field.

The Decisions of This Court Upholding the Arkansas Full-Crew and Full-Switching Crew Laws.

The motion to dismiss is also predicated upon the fact that the United States Supreme Court has upheld the Full-Switching-Crew Law and the Extra-Brakeman Act, and that those decisions are controlling upon the Court.

The plea of former adjudication must be specially pleaded to the merits and cannot be raised by motion to dismiss.

In

Fayerweather v. Ritch, 195 U. S. 276,

speaking of the plea of former adjudication, Mr. Justice Brewer, for the Supreme Court, said:

> "Whether the contention of the plaintiffs in respect to the character of the state proceeding can be sustained or not **is a question upon the merits**, and does not determine the matter of jurisdiction. * * * But, in order to make this finality rightful, it should appear that the question was distinctly put in issue; that the parties presented their evidence, or, at least, had an opportunity to present it, and that the question was decided."

Since the decisions of the United States Supreme Court upholding the validity of the Arkansas Full-Crew Laws in

C. R. I. & P. v. Arkansas, 219 U. S. 453;
St. L. I. M. & S. v. Arkansas, 240 U. S. 518,

Congress has occupied the field, and the reasoning and legal effect of the decisions of the Supreme Court, and the power of the state over the subject matter, have been effectually superseded.

Section 1 grants the Commission power to regulate "the supply of trains," and Section 13 of the Act to Regulate Commerce, as amended February 28, 1920, gives the Interstate Commerce Commission complete jurisdiction to prescribe the "rate, fare, charge, classification, regulation **or practice**," which must be adopted by interstate carriers; and the Commission, after hearing, if it finds that "any such rate, fare, charge, classification, regulation **or practice**" causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, "shall prescribe the rate, fare or charge * * * and the classification, regulation **or practice** thereafter to be observed in such manner as, in its judgment, will remove such advantages, preference, prejudice or discrimination, * * * **the law of any state or the decision or order of any state authority to the contrary notwithstanding.**"

This section of the Transportation Act—which was not in existence when the constitutionality of the Full-Crew Laws was upheld by the Supreme Court—clearly shows

that Congress, since these decisions, has occupied the field, thus nullifying the state power upon this subject.

Railroad Commission v. Southern Pacific et al., 264 U. S. 332, 34 Fed. (2d) 228.

By Section 15 of the Act to Regulate Commerce, as amended February 28, 1920, the Interstate Commerce Commission is given complete authority to determine rates, classifications, regulations and **practices**, and the Commission is given authority to prescribe what will be "a just and reasonable rate, fare or charge to be thereafter observed," and what "individual or joint classification, regulation or **practice** is, or will be, just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist," and the carriers "shall adopt the classification and shall conform to and observe the regulation or **practice** so prescribed."

By these sections the Commission is given authority not only to fix the rates so as to provide a reasonable return upon the property, but also to regulate the expenditures consistent with **proper, efficient operation and economical management.** If the Interstate Commerce Commission has authority to prescribe the rates and to regulate the expenditures, then the State of Arkansas, or any other individual state, cannot uselessly require, under the guise of the

police power, an annual expenditure by one of the carriers of this state of the sum of $800,000, which is not required by any other of the eight states through which the petitioner operates, for compliance with the so-called Full-Crew Laws. Not only has Congress legislated on this subject matter by the Transportation Act of 1920, but also by the Railroad Labor Act approved May 20, 1926, it has also occupied this field.

Congress has legislated upon the complete subject of railway labor by providing for a board of mediation and an emergency board, if necessary, to determine all disputes and issues between railroad employes and the common carriers of this country.

The Railroad Labor Act provides that it shall be the duty of carriers, their officers, agents and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes. Conferences are provided for "in case of a dispute between a carrier and its employes arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions."

Congress, by the Railroad Labor Act, has given the Railroad Labor Board jurisdiction, when called upon, to determine any and all disputes, and not only to prescribe reasonable rules, but also to determine what are proper "**working conditions**" between railroad employes and common carriers.

That the Transportation Act supersedes the police power of the state has been squarely held by the courts of our country.

The spirit and intent of the Transportation Act of 1920 was thoroughly explained by Presiding Judge Stone in the case of

M.-K.-T. R. Co. v. Northern Oklahoma Rys.,
25 Fed. (2d) 690,

as follows:

> "Probably the most important novel features of the act are the provisions designed to build up such an adequate system of railways. Those provisions have to do with railway capitalization, loans, consolidations, support of weak roads, common use of terminals, distribution of equipment and other matters. * * * It applies to all mileage 'used in interstate commerce.'"

There is an exhaustive array of decisions interpreting the Transportation Act, collated by Judge Stone in this case, and, in concluding the opinion of the Court it is said:

> "Since a portion of the traffic which this new road will transport is interstate traffic; since a railroad which takes any part in transporting interstate traffic is an instrument of interstate commerce; since 'the authority of Congress extends to every part of interstate commerce, and to every instrumentality or

agency by which it is carried on,' * * * this road could not be constructed without compliance with that statutory provision."

* * * * * * *

"Because we think this case is determined by the fact that this road would (because of the character of the traffic to be handled) be an interstate carrier, we find it unnecessary to determine or examine the further contention by appellant that the Constitution of Oklahoma (Article IX, Section 3) would compel this road to carry all freight offered it, and, therefore, could not avoid being an interstate carrier."

The decisions upholding the Arkansas Extra Brakeman and Extra Switchman Acts,

C. R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453;
St. L. I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518,

were handed down, respectively, February 20, 1911, and April 3, 1916.

This was several years before the Transportation Act of 1920, which this now holds was intended to, and did, occupy the entire field of regulation of interstate carriers. No contention was made in the above cases that Congress had then acted upon the subject.

The provision of the Arkansas Extra Brakeman Law, that the law should not apply **"where said freight train, so operated, shall consist of less than twenty-five cars,"** in view of the modern improvements and methods of rail-

roading, is so archaic and unreasonable that, upon this ground, alone, in view of the provisions of the Transportation Act and the improvement in railroad practices and safety measures since those decisions were rendered, should clearly distinguish those decisions; but the Court, in those cases, has, itself, drawn the distinction between the conditions then existing and those now obtaining. Mr. Justice Harlan, in the **Rock Island** case (219 U. S. 453), uses the following language:

> "Under the evidence, there is admittedly some room for controversy as to whether the statute is, or was, necessary; but it cannot be said that this was so unreasonable as to justify the Court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which, evidently, the State Legislature had in view. It is the means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts if they have a real relation to that object."
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> • • • • • • •
>
> "Undoubtedly, Congress, in its discretion, may take charge of the whole subject of the equipment of interstate cars and establish such regulations as are necessary and proper for the protection of those engaged in interstate commerce; **but it has not done so in respect of the number of employes to whom may be committed the actual management of interstate trains of any kind. It has not established any regulations upon that subject, and, until it does, the statutes of**

> **the states, not in their nature arbitrary, and which really relate to the rights and duties of all within its jurisdiction, must control**" (219 U. S. 466).

In other words, the very condition which was absent at the time that the above decision was rendered, i. e., the fact that Congress had not taken "**entire charge of the whole subject,**" does exist at the present time.

Congress has now legislated upon the whole field and delegated to one central body, outside the State of Arkansas, the regulation of "**the whole subject of the equipment of interstate cars,**" and, by doing so, according to the decision of Mr. Justice Harlan in the **Rock Island** case, the power of the state to legislate upon the same subject terminated.

If a given state, since the Transportation Act, can adopt regulations affecting freight trains transporting interstate commerce and containing over twenty-five cars, then it can impose such regulations upon trains containing five or ten cars, and this would be just as reasonable as the present regulation which affects trains of twenty-five cars.

In the **Iron Mountain** case (240 U. S. 518), wherein the Supreme Court upheld the Arkansas Full-Switching-Crew Law, speaking through Mr. Justice McKenna, the Court said, referring to the previous **Rock Island** case, upholding the validity of the Extra-Brakeman Act:

> "In that case, as in this, there was controversy in the testimony and the contentions of the parties as to

the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power."

* * * * * * *

"A more serious objection is that certain terminal companies, one at the City of Helena and one at Fort Smith, do switching for certain connecting trunk lines, and yet, by reason of their length being less than one hundred miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitrary, if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary.

"We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will, as a whole, fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant" (240 U. S. 521).

As said by Mr. Justice Harlan, in the **Rock Island** case:

"Undoubtedly Congress, in its discretion, may take entire charge of the whole subject of the equipment of interstate cars."

Since those decisions were rendered Congress **has** done so. The subsequent action of Congress completely removes the reasons upon which these decisions are based. The supreme legislative power had not acted upon the subject

upon which the subordinate legislative power had legislated when those decisions were rendered.

The height of oppression, which the rigor of the Arkansas statutes resulted in, may have been one reason which prompted Congress to take over the subject matter and provide for the more reasonable rule which now obtains.

In any event, the condition confronting the Court, when these decisions were rendered, no longer obtains, and, exit the reason therefor, those decisions should not longer be held controlling upon the courts.

The Railroad Labor Act of 1926.

Appellees, in their brief, contend that

> "the Railway Labor Act has no possible effect upon the exercise of state police power" (p. 63),

yet appellees admit that the Railway Labor Act of 1926 provides that

> "it is the duty of carriers and employes to make and maintain agreements concerning rates of pay, rules and working conditions" (Appellees' Brief, p. 63).

Appellees contend that, necessarily, the agreements contemplated by the Federal Act are subject to

> "state statutes passed in the exercise of police power" (Appellees' Brief, p. 64).

Arkansas Statutes in Conflict With Railroad Labor Act of 1926.

Appellees contend that the Arkansas Full-Crew Statutes, sought to be enjoined in this case, are not in conflict with the spirit and intent of the Federal Railroad Labor Act of 1926.

By the Federal Railroad Labor Act, Congress made it the duty of carriers and their employes to exert every reasonable effort to make and maintain agreements concerning rules and working conditions, and by the affidavits of the appellant filed in this case, agreements have been made and are in force on the Missouri Pacific Railroad and other roads providing for operation of freight trains with but two brakemen and of switch engines with a less number of switchmen than are required by the Arkansas laws in all the other states in which the Missouri Pacific operates, except the State of Arkansas.

Clearly, by preventing the making of such contracts with its employes in the State of Arkansas, these statutes prevent the Railroad Company and its employes from entering into agreements as directed by the Federal Railroad Labor Act of 1926, in the State of Arkansas.

If the State of Arkansas can thus prevent the making of contracts between interstate carriers by railroad and employes regarding "rules and working conditions," then, by the same token, the state can abrogate such contracts, when made, and thus prevent the enforcement of the Fed-

eral Railroad Labor Act of 1926; and the Legislature of Arkansas, with equal force, could provide that no agreements touching "rules and working conditions" should be effective unless approved by the Railroad Commission of the State of Arkansas or some other state authority.

Arkansas Laws Violate Spirit and Intent of Federal Safety Appliance Acts.

By the Federal Safety Appliance Acts and the authority delegated to the Interstate Commerce Commission thereunder provision is made for the control of the speed of trains by forbidding the use of any locomotive not equipped with power-driven wheel brakes and appliances for operating the train-brake system, and railroads are forbidden to run any train that has not a sufficient number of cars equipped with power or train brakes, so that the engineer on a locomotive drawing such train can control its speed without requiring the brakeman to use the common hand brakes for that purpose. It is a fact, of which this Court will take judicial notice and affirmed by the affidavits filed herein, that the report of the Bureau of Safety of the Interstate Commerce Commission shows that over 99 per cent of the cars and trains tested by the Commission's inspectors were controlled by air brakes. All the improvements, the petition alleges, in equipment and roadbed have occurred since the decisions of this Court upholding the validity of the Arkansas statutes as police regulations.

In the case of New York Central R. R. Co. v. United States (265 U. S. 41), Mr. Justice Butler, in construing the acts of Congress and the orders of the Commission thereunder, held that the acts of Congress should be liberally construed in order to relieve brakemen of the labor and danger involved in the use of hand brakes to control the speed of trains and to promote the safety of trains and the persons and property thereon, and that it was the intent of Congress and the Commission, as soon as practicable, to require all cars to be equipped with power brakes (11 I. C. C. 429).

In other words, the acts of Congress, as interpreted by this Court and the Interstate Commerce Commission, intend that the speed of trains should be controlled with power or train brakes, operated by the engineer, instead of by hand brakes operated by brakemen upon freight trains. Congress has thus occupied the field and determined, under the Commerce Clause of the Constitution, what is the safest way in which to operate trains engaged in interstate commerce, and this does not leave the question open for state legislation and police regulations to determine that extra brakemen shall be employed to operate hand brakes at all. Under the federal legislation they are no longer used in the operation of freight trains.

And by Section 1 of the Transportation Act the Interstate Commerce Commission has been given exclusive jurisdiction to regulate "the supply of trains."

In re Train Service on Northern Pacific, 112 I. C. C. 191.

Arkansas Laws in Conflict With Sections 13 and 15 of Transportation Act of 1920.

That the decision of the three-judge court, holding that the Commission could not go into the question of cost where state laws required the expenditure, is not the law, is evidenced by the recent decision of this Court in Lehigh Valley R. Co. v. Commissioners (278 U. S. 34), where Mr. Chief Justice Taft for this Court, after citing the case of Erie R. R. v. Board (254 U. S. 394), said:

> "This is not to be construed as meaning that the danger to the public would justify great expenditures reasonably burdening the railroad when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. * * * We emphasize this, not because there is doubt about it, but because we deprecate the impression, apparently entertained by some, that in the safeguarding of railroad crossings by order of state or local authority, the exercise of police power escapes the ordinary constitutional limitations of **reasonableness of cost.** * * * It was certainly not intended by the Transportation Act to take from the states, or to thrust upon the Interstate Commerce Commission, investigation into parochial matters like this, unless, **by reason of their effect on economical management and service, their general bearing is clear.**"

Mr. Justice McReynolds dissented from the majority opinion in the Lehigh Valley case upon the ground that the Board of Public Utilities had no authority to impose

a charge of $100,000 upon the railroad under the pretense of objecting to a six per cent curve in a country road, and that such order was a plain abuse of power.

Both from Mr. Justice McReynold's opinion in the Lehigh Valley case and from the majority opinion, it is clear that the Interstate Commerce Act, as properly interpreted, vests in the Interstate Commerce Commission, and solely in that administrative body, the right to set aside such expenditures as the Arkansas Full Crew Laws entail upon the railroads of the state as uneconomical and unreasonable, and in violation of the Car Service Section of the Transportation Act.

In C. St. P. M. & O. R. Co. v. Hollenberg (282 U. S. 162), under a statute of Nebraska, the railroad company was required to construct an underground cattle pass across its right of way, in order to save the farmer from inconvenience of using an existing grade crossing.

The railroad company contended that this statute confiscated the defendant's property without due process of law. The Commission had not found that the grade crossing was inadequate or dangerous.

In reversing the decision of the Supreme Court of Nebraska (115 Neb. 727), upholding the State Commission's order, Mr. Justice Stone, for this Court, said:

> "It is plain that the Commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for

the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is the taking of property without due process of law forbidden by the Fourteenth Amendment."

C. St. P. M. & O. R. Co. v. Hollenberg, 282 U. S. 167.

In speaking upon the Transportation Act, when it was before the Senate of the United States, the late Senator Cummins, on December 11, 1919, in the Senate of the United States, said:

"I realize that if railway companies should attempt to pay their employes an excessive compensation—so excessive as to be obviously wrong, and if the Transportation Board, which is given jurisdiction over the Regional Boards of Adjustment and the Committee of Wages and Working Conditions, do not correct that evil, then we must take measures to correct it."

Congressional Record, Vol. 59, Part 1, page 396.

Senator Robinson, speaking on the Conference Committee Bill, with reference to section 422, also said:

"Honest and economical management and expenditures constitute an important and controlling consideration. * * * The provision gives due considera-

tion to the necessity for honest and economical management. * * * The decision in Wilson v. Newell (243 U. S. 35) expressly affirms the power of Congress to fix wages or the standard for determining them in case of disputes between railroads and their employes and to provide for appropriate legislation for compulsory arbitration."

Congressional Record, Vol. 59, Part 4, pages 3331, 3334.

Decision of the Three-Judge Court Is In Conflict With Many Decisions of This Court.

In the case of

Hammer etc. v. Dagenhart, 247 U. S. 251,

the Court held:

"The power to regulate interstate commerce is the power to prescribe the rule by which the commerce is to be governed; in other words, to control the means by which it is carried on."

In the case of

M. K. & T. Ry. Co. v. State of Texas,
245 U. S. 484,

the Court held:

"Where, in regular course, a passenger train is moved by one company from one state to a point in another and is there taken charge of and carried to

destination by a second company, local to the second state, it is manifestly erroneous to hold that its interstate character is lost because the second company employs new crews and engines and cannot go beyond the state line.

"An order of the Texas Railroad Commission requiring passenger trains in the state to leave stations on advertised schedule time, and allowing them no more than thirty minutes at origin or points of junction to make connection with trains of other lines, or ten minutes more if at the end of the thirty minutes the connecting trains are in sight, is an unjustifiable interference with interstate commerce as applied to a local railroad company in respect of an interstate train which, under contract, the company receives at a point within the state line from a connecting company and forwards (in sections) to its destinations within the state."

In the case of

Railroad Co. v. Public Service Commission,
250 U. S. 566,

the Court said:

"As applied to an interstate train terminated by a mail car, the law of Pennsylvania (Laws 1911, p. 1053, Sec. 7) forbidding the operation of any train consisting of United States mail, or express cars, without the rear end of the rear car being equipped with a platform of thirty inches in width, with guard rails and steps, invades a subject of regulation fully occupied by Congress through the rules of the Post-

master-General respecting the construction of mail cars and their equipment when used as end cars, and under the commerce clause, as is evinced by the Safety Appliance Act and regulations of the Interstate Commerce Commission thereunder, particularly those permitting the employment of caboose cars, which are constantly used as end cars, without platforms."

In the case of

Charleston & Co. R. R. v. Vernville Co.,
237 U. S. 597,

the Court held:

"A state law not contrived in aid of the policies of Congress, but to enforce a policy of the state differently conceived, cannot be said to be in aid of interstate commerce.

"When Congress has taken the particular subject matter in hand, coincidence of a statute is as ineffective as opposition, and a state law on the same subject cannot be sustained as a help to the federal statute because it goes farther than Congress has seen fit to go.

"A state statute which is a burden on interstate commerce is not saved by calling it an exercise of police power."

In the case of

Texas & Pacific Ry. v. Rigsby,
241 U. S. 33, 38,

the Supreme Court of the United States said:

"In **Southern Ry. v. United States**, 222 U. S. 20, it was held that the 1903 amendment enlarged the scope of the original act so as to embrace all cars used on any railway that is a highway of interstate commerce, **whether the particular cars are at the time employed in such commerce or not.** The question whether the legislation as thus construed was within the power of Congress under the commerce clause was answered in the affirmative, the Court saying (p. 27):

"'Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: **Both classes of traffic are at times carried in the same car,** and when this is not the case the **cars in which they are carried are frequently commingled in the same train** and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; **and the situation is much the same with trainmen,** switchmen and like employes, for they **usually, if not necessarily, have to do with both classes of traffic.** Besides, **the several trains on the same railroad are not independent in point of movement and safety, but are interdependent,** for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to **impede the progress** and **imperil the safety or other trains.** And so the absence of appropriate safety appliances from any part of any

train is a menace not only to that train but to others.'

"In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper, for the protection of employes and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, **irrespective** of the use made of any particular car at any **particular time. Congress having entered this field of regulation,** it follows from the paramount character of its authority that state regulation of the subject matter is excluded (**Southern Ry. v. R. R. Comm. Indiana,** 236 U. S. 439)."

In the case of

Alabama & Vicksburg v. Jackson & Eastern,
46 Sup. Ct. Rep. 536-537,

the Supreme Court said:

"While none of the amendments in specific terms confer upon the Commission exclusive powers over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question.

* * * * * * *

"The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so shows that the jurisdiction of the Commission over

such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction" (45 Sup. Ct. Rep. 536-537).

In the case of

South Covington Ry. Co. v. Covington,
235 U. S. 537-8,

the Court held:

"An uninterrupted transportation of passengers between states on the same cars, under practically the same management and for a single fare, constitutes interstate commerce, although the track in each state is owned by a separate corporation.

"Regulations in the ordinance involved in this case as to number of cars to be run and the number of passengers allowed in each car between interstate points directly affect and are a burden on interstate commerce and void under the commerce clause of the Federal Constitution."

In the opinion, page 548, the Court said:

"We need not stop to consider whether Congress has undertaken to regulate such interstate transpor-

tation as this, for it is clearly within its powers to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

In

The Seaboard Air Line Ry. Co. v. Blackwell,
244 U. S. 310,

it was held:

"That provision of the 'Blow-post' Law of Georgia (Civil Code 1910, Sections 2675-2677), which requires railroad companies to check the speed of trains before public road crossings, so that trains may be stopped in time should any person or thing be crossing the track there, is a direct and unconstitutional interference with interstate commerce, as applied to the state of facts specifically pleaded by the defendant interstate carrier in this case, whereby it appears that, to comply with the requirement, the interstate train in question would have been obliged to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia, extending from Atlanta to the South Carolina line, and that more than six hours would thus have been added to the scheduled time of four hours and thirty minutes (**Southern Railway Co. v. King**, 217 U. S. 524, distinguished)."

In the conclusion of their brief appellees say:

> "Today we observe freight trains with as many as one hundred cars or more winding through the countryside," etc.

Of course, this is true in all the states through which the appellant operates, with the sole exception of the State of Arkansas. Does it not follow, with this admission from the appellees, that if freight trains **"with as many as one hundred cars or more"** can wind through the other states in the American Union, conveying to the markets the traffic from the countryside, this could be done as well in Arkansas with the low grades and improved roadbeds and tracks as well as in other states if it were not for the Full-Crew and Full-Switching-Crew Laws complained of in this case?

This admission of the appellees shows the wisdom of Congress in embracing in the car service section of the Transportation Act of 1920 the provision giving the Interstate Commerce Commission exclusive jurisdiction over "the supply of trains," and it also justifies the wisdom in the Railroad Labor Act of 1926 requiring railroads and their employes to reach agreements touching "rules and working conditions," and the fact that agreements providing for one less brakeman and one less switchman in all the states through which the appellant operates than in the State of Arkansas have been entered into, as evidenced by the affidavits filed in this case, should conclusively es-

tablish that the same agreements could be made in Arkansas were it not for the laws complained of.

By virtue of these agreements in the other states the employes should be held to be estopped from contending that more than two brakemen or more than two switchmen are necessary in any state, and this should be conclusive against the appellees; that the laws complained of are inconsistent both with the car service section of the Act to Regulate Commerce and the provisions of the Federal Railroad Labor Act of 1926.

Wherefore, it is contended that the decision of the Three-Judge Court should be reversed, with directions to grant the injunction prayed for against the Arkansas statute complained of.

Respectfully submitted,

THOMAS B. PRYOR,
EDWARD J. WHITE,
Counsel for Appellant.

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IN THE

Supreme Court of the United States

October Term, 1930.

No. 193.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

vs.

HAL NORWOOD, ATTORNEY GENERAL OF THE STATE OF ARKANSAS; JOE JOINER, PROSECUTING ATTORNEY FOR THE THIRTEENTH CIRCUIT OF ARKANSAS, ET AL., ETC.,
Appellees.

Appeal From the District Court of the United States for the Western District of Arkansas

BRIEF FOR APPELLEES

STATEMENT.

This is an appeal from an order by a three-judge statutory court sustaining a motion to dismiss appellant's bill of complaint against the Attorney General of the State of Arkansas, and the prosecuting attorneys for the 12th and 13th Circuits. Appellant seeks to restrain the enforcement of the Arkansas "full train crew law" (passed in 1907) and "full switching crew law" (passed

in 1913) on the ground that said statutes have become void, and now (1) are unlawful attempts to regulate interstate commerce, (2) impose undue and unreasonable burdens thereon, (3) deprive the appellant of its property without due process of law, and (4) deny to appellant the equal protection of the laws.

These two laws were explicitly held to be constitutional by this court in—

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453.

St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518.

The statement of appellant is incorrect in describing these laws as the "Arkansas extra brakemen and extra switchmen laws", a description not warranted by their provisions, or justified by common usage. The laws are correctly described early in appellant's own bill as the "Arkansas full switching crew and full train crew laws". (Rec. 6.) They are similar in content and purpose to the laws of many other states which are listed in the Appendix to this brief, and which constitute a body of state law well known and frequently described in judicial opinions as "full crew laws".

Appellant's bill is directed, not against an exceptional law of the State of Arkansas, but against a large body of state law which has hitherto been sustained by the decisions of this court, which decisions appellant now seeks to reverse, and thereby to bring about the wholesale annullment by judicial action of state legislation enacted and sustained under the police power to protect the public safety and welfare. Such legislation has been operative in various states for many years, and its validity has been consistently upheld by the Supreme Courts of the

several states, and the Supreme Court of the United States.

Appellant's statement of the case is also incorrect in the intermingling of allegations of the bill of complaint with statements made in affidavits filed in support of the motion for a temporary injunction. These affidavits constitute a large part of the record (Rec. 19-103), but the existence of the facts therein alleged is not admitted by the motion to dismiss, whereby only facts well pleaded in the bill of complaint are admitted. A glance at the citations of the record in appellant's statement will show that almost all the allegations of fact relied on by appellant are found **in the affidavits** and **not** in the bill of complaint. The bill of complaint itself consists largely of the conclusions of the pleader, supported by a few assertions, many of which are controverted by established facts, of which the court will take judicial notice.

> "Judicial notice can and must be taken even as against the averments of contrary conclusions in a pleading." *U. S. vs. Flournoy, etc., Co.*, 71 Fed. 572.

It is, therefore, necessary for appellees to make a short summary of the actual allegations of the bill of complaint in order that the actual issues of the present case may be clearly defined.

Allegations of Bill of Complaint

The appellant represented to the court (Par. V) that railroad operating conditions "generally differ from operating conditions which existed in 1907 and 1913 when the Arkansas full switching crew and full train crew laws were passed"; that road and equipment is now heavier and stronger and safer; that freight trains "containing many more cars than those which could be safely oper-

ated when said laws were enacted can now be operated in Arkansas, and throughout the United States generally, much more safely than smaller trains could then be operated"; that additions and betterments have been made for the express purpose of increasing efficiency and safety "in the running of longer and heavier freight and passenger trains". (Rec. 6.)

Even if appellant's dubious conclusion that heavier, stronger and longer trains are also "safer", is accepted as an allegation of fact, there is no allegation, nor even any implication, that **fewer men** are needed to operate **longer** and heavier trains in 1931 than were needed to operate lighter and shorter trains over twenty years ago. On the contrary it is obvious that **more men** are needed to handle and inspect **more cars** and longer trains.

Appellant alleges that it is "standard practice * * * wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the extra switchmen and extra brakemen provided by the Arkansas laws". But, subsequently in Paragraph VI (Rec. 8), appellant qualifies this allegation by asserting that the "standard crew" engaged in switching and freight train service contains one less brakeman **"with the exception of the service in states with laws similar to the above laws of the State of Arkansas"**. Thereby, the force of appellant's allegation as to what is "standard practice" is destroyed when the attention of the court is called to the number of laws which prohibit any such "standard practice".

In addition, it will be noted that the allegations of the bill of complaint are further qualified by the allegation that trains and switch engines are commonly operated "except in the State of Arkansas * * * wherever

the traffic and circumstances make such operation advisable without such extra switchmen and extra brakemen". (Rec. 7.) Thereby, the complaint admits through its own allegation that traffic and circumstances do make it advisable at times to use the full crews required by the Arkansas law. Since it is a matter of common knowledge, of which the court will take judicial notice, that freight trains are operated today in various parts of the United States, which vary in length from a few cars to over one hundred cars, it must be obvious, regardless of, or even despite the allegations of the bill of complaint, that the same number of men can not operate any freight train under any circumstances in road or switching service with the same safety and efficiency, and that there can be no "standard practice" for operating trains, regardless of the number of cars or the circumstances of operation.

The bill of complaint in Paragraphs VI and VII alleges that various savings could be made by the complainant if not required to comply with the Arkansas full crew laws, but there is no allegation of fact which even implies that there is any less need for the full crews required by the Arkansas laws, to operate the heavier and longer trains now being operated today, than there was to operate shorter trains years ago when these same laws were sustained by the Supreme Court of the State of Arkansas and the Supreme Court of the United States.

It is apparent on careful reading that the allegations of the bill of complaint, up to Paragraph X (Rec. 11) amount to nothing more than a reassertion of the same contentions previously made in this court when the validity of these laws was originally assailed. They are the same contentions which were rejected when the laws were sustained by the Supreme Courts of the State of

Arkansas and of the United States. This probably explains why these contentions receive only perfunctory support in the first 4 pages of appellant's 62-page argument. Appellant cannot reasonably expect this court to annul laws now more essential to the public safety than when they were originally sustained by this court, on a mere reargument of the objections originally made.

The principal contentions of appellant (to which almost all of its argument is addressed) are based on the allegations of the bill of complaint found in Paragraphs X, XI, XII. It is alleged that the statutes of Arkansas are in conflict with the general scheme of Federal regulation, as shown in the Interstate Commerce Act, as amended by the Transportation Act of 1920, and by the Railway Labor Act of 1926. The Appellant seeks to have this court overrule its previous opinions sustaining the Arkansas laws on the ground that since those opinions were rendered, Congress has undertaken a more comprehensive scheme of regulation, and has extended the exercise of the Federal power under the Interstate Commerce clause of the Constitution to cover the subject matter of regulating the number of men to be employed in operating trains engaged in interstate commerce. These whole-hearted contentions of appellant were seriously presented before the statutory court, and almost the entire opinion of that court was devoted to a consideration of this issue. The court held, after an exhaustive analysis of recent amendments to the Interstate Commerce Act, that the Federal Government had not occupied by national legislation the field covered by the Arkansas laws, that Congress had not intended, in passing the Transportation Act or the Railway Labor Act, to occupy this field, and that, therefore, the laws which had been previously sustained by the Supreme Court as valid exercises

of the state police power are still constitutional enactments.

Appellees believe that the three-judge statutory court properly held that Congress has not attempted to occupy this field of state regulation either by passing any law directly regulating the number of men required to operate trains, or by authorizing the Interstate Commerce Commission to make any such regulations. But it is the prior contention of appellees that the bill of complaint should have been dismissed (without the necessity of examining into this question) on two grounds set forth in the motion to dismiss: First, because this is a suit against the State of Arkansas, in contravention of the Eleventh Amendment; and Second, because the complainant is seeking to enjoin the enforcement of the criminal statutes of the State without undertaking to avail itself of the full and complete remedy which it has at law in defending against the suits brought against it by appellees to enforce the laws of the State in the courts of the State.

Inasmuch as the Supreme Court of the United States has never held that a bill in equity will lie to prevent the enforcement by the Attorney General of the laws of a state **which the Supreme Court itself has previously held to be constitutional**, we submit that the primary and most important point to be determined in this case lies at the threshold of the proceeding: **Did the three-judge statutory court have any jurisdiction to entertain this bill of complaint in view of the specific prohibition of the Eleventh Amendment?**

Furthermore, we would submit that the Supreme Court of the United States has **never** decided that (1) where a criminal prosecution has been brought to enforce a law of a state in the courts of a state, after the law has been held constitutional by the Supreme Court of

the United States, and (2) where the defendant has a complete remedy at law by setting up the alleged unconstitutionality of the law and obtaining eventually another decision by this court upon that question, he can, without appealing from a decision against him in the state court, transfer the controversy to the Federal courts and file a bill in equity for the purpose of enjoining the enforcement of the state law which has been held by this court to be the law.

These questions, we submit, are of primary and grave importance. Therefore, before undertaking any argument in support of the opinion of the three-judge statutory court, we would ask this court to determine whether the decision of the statutory court should not be sustained upon those grounds of the motion to dismiss, which were rejected by the statutory court.

The opinion of the three-judge statutory court is found in *Mo. Pac. Railroad Co. v. Norwood, et al.*, 42 F. (2d) 765.

Summary of Argument

I.

The bill of complaint was properly dismissed because this is a suit against the State of Arkansas in contravention of the Eleventh Amendment to the Constitution of the United States. A federal court has no jurisdiction to enjoin state officers from enforcing a state statute which has been held constitutional by the Supreme Court of the United States.

In re Ayers, 123 U. S. 443;
Minnesota v. Hitchcock, 185 U. S. 373, 386;
Fenner vs. Boykin, 271 U. S. 240;
Mass. State Grange vs. Benton, 272 U. S. 525.

II.

The bill of complaint was properly dismissed because the complainant had a plain, adequate and complete remedy at law.

Judicial Code, Sec. 267;
Terrace vs. Thompson, 263 U. S. 197;
Packard vs. Banton, 264 U. S. 140;
Hygrade Provision Co. vs. Sherman, 266 U. S. 497.

"The accused should first set up and rely upon his defense in the State courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise if, whenever about to be charged with violating a State law, one were permitted free-

ly to contest its validity by an original proceeding in some federal court."

Fenner vs. Boykin, 271 U. S. 240, 243.

III.

The bill of complaint was properly dismissed because it did not allege and properly plead any facts which, if proved, would warrant the court in adjudging that these Arkansas statutes (which had been previously upheld by the Supreme Court of Arkansas and the Supreme Court of the United States) were arbitrary exercises of the police power of the State.

Equitable Life Ins. Co. v. Brown, 213 U. S. 25, 43.

Southern R. Co. v. King, 217 U. S. 524, 534.

C. R. I. & P. R. Co. v. Arkansas, 219 U. S. 453.

Atl. Coast Line v. Goldboro, 232 U. S. 548.

Standard Oil Co. v. Marysville, 279 U. S. 582, 584.

IV.

The bill of complaint was properly dismissed on the ground that the Congress has not undertaken to occupy the field of legislation covered by these (and other similar) state statutes, and that, therefore, the state police power can be, and has been, validly exerted in this field.

B. & O. R. Co. v. U. S., 277 U. S. 291.

Peoria & P. U. R. Co. v. U. S., 263 U. S. 528.

U. S. v. Penn. R. Co., 242 U. S. 208.

Interstate Com. Com. v. Goodrich Tr. Co., 224 U. S. 194, 214.

Interstate Com. Com. v. U. S. ex rel., 280 U. S. 52, 69.

V.

The intention of Congress to exclude exercise of the state police power must be clearly manifested.

Napier v. Atlantic Coast Line, 272 U. S. 605.
Savage v. Jones, 225 U. S. 501, 533.
C. R. I. & P. R. Co. v. Arkansas, 219 U. S. 453.
Penn. R. Co. v. Pub. Serv. Com., 250 U. S. 566.
Morris v. Duby, 274 U. S. 135, 144.
N. C. & St. L. R. v. White, 278 U. S. 456.

VI.

If Congress had empowered the Interstate Commerce Commission to regulate train crews appellant should have applied to the Commission before filing a bill in the Federal Court.

Missouri Pacific Ry. Co. v. Larabee Mills Co., 211 U. S. 612, 620.
Minnesota Rate Cases, 230 U. S. 352, 402, 417, 420.
Atlantic Coast Line v. Georgia, 234 U. S. 280, 291.
Morris v. Duby, 274 U. S. 135, 144.

ARGUMENT.*

I.

This is a suit against the State of Arkansas in contravention of the Eleventh Amendment. This court has never held that the Attorney General of a state can be sued in the Federal Court to restrain the enforcement of a state law which has been held to be constitutional by the Supreme Court of his State and by the Supreme Court of the United States; and which has been enforced as a valid law of the State, over a period of many years.

Under these circumstances, it is clear that the Attorney General is fulfilling his sworn duty as a State officer in enforcing a law which (after being held valid by the highest courts of the State and Nation) **is the law of the State** until it is amended or superseded by another law, or at least until the highest courts of the State and Nation have overruled their previous decisions and annulled the law.

There is not a single case cited by counsel for appellant, or by the statutory court, which, either by express language or by declared principle, holds that the present suit can be maintained in the Federal Courts. On the other hand, the language of the Eleventh Amendment to the Constitution of the United States is clear and mandatory, and the courts of the United States should not assume to exercise a power expressly forbidden in this provision of the Constitution, which reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the

*—Black face in quotations are ours unless otherwise indicated.

United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

The Attorney General and prosecuting attorneys of Arkansas were certainly acting as State officials, and not as individuals, when enforcing the Arkansas full crew laws, after they had been expressly held to be constitutional by the Supreme Courts of Arkansas and of the United States.

"The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State."

Twining vs. New Jersey, 211 U. S. 78, 90.

The acts of State officials enforcing laws which had been upheld by the highest courts of the State and Nation were the acts of the State of Arkansas.

"The amendment applies to any suit brought in name against an officer of the State, when 'the State, though not named, is the real party against which the relief is asked, and the judgment will operate'. In re Ayers, 123 U. S. 443."

Minnesota v. Hitchcock, 185 U. S. 373, 386.

The assumed authority for invoking the judicial power of the Federal Courts in this case, which is relied on by counsel for appellant (and which seems to have been accepted without careful consideration by the three-judge statutory court) is the doctrine enunciated in *Ex parte Young*, 209 U. S. 123, which may be summarized in the following quotations from the opinion of the court in that case (p. 159):

"The use of the name of the State to enforce an **unconstitutional** act to the injury of complainants

> is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. * * * If the Act which the state Attorney General seeks to enfotce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the supreme authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

It should be at once apparent that the doctrine of *Ex parte Young*, and the cases which have followed it, is not applicable to the present case. It is conceded in the opinion in that case that the act of the Attorney General in his official character in enforcing the law of the State is the act of the State. A suit to enjoin the Attorney General from so acting would be a suit against the State. Indeed, one may ask how a State can be sued without the service of process upon an officer, or how a State can act except through an officer? But it has been held, according to the doctrine of ex parte Young, that where a State officer seeks to enforce an unconstitutional act, he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

Such a doctrine may be reasonably applied where a public official attempts to enforce a new enactment or an order recently issued by a regulatory commission. Such a doctrine might even be applied to a law which had been enforced for some time but whose validity had never been tested. But can this doctrine be applied to the present situation where the law officers of the State are enforcing laws which have been held constitutional by the highest courts of the State and Nation, and

have been concededly the law of the State for many years? What becomes of the canons of law obedience which are impressed on all citizens if, after the highest Federal Court has held a law to be constitutional, an inferior Federal Court can entertain a suit against an officer charged with enforcement of the law, subjecting him "in his person, to the consequences of his individual conduct"—in enforcing the law of the State. The statutes of the State which have been sustained by highest authority can not well be regarded as the law of the State one day and waste paper the next day without intervening legislative or judicial action. Surely it is not consistent with a "government of law" to enunciate the doctrine that the decisions of the highest courts of the State and Nation may be overruled by the mere force of "changing conditions". If there are "changing conditions" which warrant a reversal by these courts of their previous opinions, it should require action by these courts in changing their opinions to change the law. How are public officials or private citizens to know and to obey "the law" if laws may simply evaporate through the action of unseen, unmeasurable or imponderable forces, disappearing at some indefinite time—perhaps between the sundown of one day and the sunrise of the next!

It can not be argued that the supposed violator of a law, which because of "changed conditions" should be annulled, has no remedy against the enforcement of such a law. Any person prosecuted for violation of a law can raise the question of its validity and be assured of an ultimate review by the Supreme Court of the United States if there is a question of violation of the Federal Constitution involved. (*Fenner v. Boykin*, 271 U. S. 240.) The question here presented is only as to whether a non-citizen can bring a suit against a State in the Federal

Courts (which a citizen could not bring, *Hans v. Louisiana*, 134 U. S. 1) to prevent the enforcement of a law of the State on the ground that, although the Supreme Court of the United States has held the law to be valid, he believes that, upon a further consideration, in the light of "changed conditions", the Supreme Court of the United States will change its opinion and thus destroy the validity of a statute to which that court had previously given its sanction.

It has been frequently held that the power of the Supreme Court to hold invalid the laws of the several States is one of the most profoundly important and delicate functions of the court. It is certainly reasonable to assume that when that power is exercised, the decision of the Supreme Court will remain the "law of the land" until such time as the court itself reverses that decision. The law written by a legislature may become obsolete with the passage of time. Its application to the new conditions of a new day may seem foolish. But if the law is within the discretion of the legislative power, it will remain the law until such time as the legislature amends or repeals the law. Surely the law of the land as laid down by the Supreme Court of the United States should be given equal sanction.

Therefore, we submit that a suit such as the present suit against a State officer, to restrain him from enforcing a law of the State which has been held constitutional by the Supreme Court of the United States, is, and should be held to be a suit against that State officer in his official capacity because of his using the name of the State to enforce a constitutional act—an act of the State in its sovereign capacity—and that the judicial power of the United States does not extend to any such suit in law or equity prosecuted against the State by the citizens of another State.

In order to make it clear that the question here presented has never been ruled upon by the Supreme Court in the cases upon which appellant relies, we venture to review briefly these opinions. Thereby we hope to demonstrate that, on the contrary, the reasoning of these opinions shows that if the principles enunciated in *Ex parte Young*, and subsequent cases, are followed, the present suit must be held not to come within the doctrine of *Ex parte Young*, but to come under the prohibitions of the Eleventh Amendment.

In *Fitts vs. McGhee*, 172 U. S. 516, this court held that a suit to enjoin the Attorney General of the State of Alabama from prosecuting criminal proceedings in the State court did not lie, on the ground that the suit was one against the State, in violation of the Eleventh Amendment. Reviewing the cases cited in support of the contention that the suit was not brought against the State, this court held as follows (p. 529):

> "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some **specific wrong or trespass** to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by **some positive act a wrong or trespass**, and a suit against officers of a State merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State."

Fitts vs. McGhee, supra.

The exception to the general rule indicated in the foregoing quotation is expressly and carefully made in the leading case of *Ex parte Young*, in which appears the following holding which has been quoted repeatedly in later opinions (p. 155):

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

Ex parte Young, supra.

Quotations will now be made from a series of cases following this case for the purpose of showing, both the reason for the exception to the general rule and the conditions necessary to bring a case within the exception.

In *Truax v. Raich*, 239 U. S., 33, 60 L. Ed. 131, it was held that a bill in equity could be sustained when "framed upon the theory that the act is unconstitutional and that the defendants who are public officers concerned with the enforcement of the laws of the State are about to proceed wrongfully to the complainant's injury," and the court stated:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (*Re Sawyer*, 124 U. S. 200, 210, 31 L. Ed. 420, 405; 8 Sup. Ct. Rep. 482), a distinc-

tion obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." (Many citations.)

It is worthy of note that Mr. Justice McReynolds dissented from the opinion of the court in the Truax case on the ground that it was in fact a suit against the State, not to be maintained under the doctrine of *Fitts v. McGhee*, supra, and in his dissent stated:

> "If *Ex parte Young*, 209 U. S. 123, 53 L. Ed. 714; 13 L. R. A. (N. S.) 932; 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and the cases following it, support the doctrine that federal courts may enjoin the enforcement of criminal statutes enacted by State legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the amendment ought to be given effect, not refined away."

This dissent is noteworthy because quite recently Mr. Justice McReynolds has delivered opinions of the Supreme Court emphasizing the limited nature of the exception to the general rule which was established in *Ex parte Young*, thus indicating that this court is opposed to such an extension of the exception as would practically wipe out the general rule and subject the law enforcement officers of a State to constant interference and control in performance of their duties through proceedings brought in the federal courts.

Following the *Truax* case, are the following significant opinions:

"It is now settled doctrine 'that individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.' (Citations.) But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young*, 209 U. S. 166, 52 L. Ed. 731; 13 L. R. A. (N. S.), 932; 28 Sup. Ct. Rep. 441; 14 Ann. Cas. 764. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable."

Cavanaugh v. Looney, 248 U. S. 453, 456; 63 L. Ed. 354, 358.

"The unconstitutionality of a State law is not, of itself, ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical, and efficient as that which equity could afford. (Citations.) Equity jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the State, is clothed with the duty of enforcing its laws,

and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity." (Many citations.)

Terrace v. Thompson, 263 U. S. 197, 214; 68 L. Ed. 255, 274.

"But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property.' *Truax v. Raich*, 239 U. S. 33, 37, 38; 60 L. Ed. 131, 133, 134; L. R. A. 1916D, 545; 36 Sup. Ct. Rep. 7; Ann. Cas. 1917B, 283. The question has so recently been considered that we need do no more than cite *Terrace v. Thompson*, 263, U. S. 197, ante, 255; 44 Sup. Ct. Rep. 15, decided November 12, 1923, where the cases are collected, and state our conclusion that the present suit falls within the exception and not the general rule. *Houston v. Des Moines*, 176 Iowa, 455, 464; 156 N. W. 883; *Dobbins v. Los Angeles*, 195 U. S. 223; 49 L. Ed. 169; 25 Sup. Ct. Rep. 18."

Packard v. Banton, 264 U. S. 140, 143; 68 L. Ed. 596, 607.

Following the cases last cited, we find their doctrine affirmed in the following case:

"The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional."

Hygrade Provision Company v. Sherman, 266 U. S. 497, 500; 69 L. Ed. 402, 407.

Then we arrive at an opinion of the Supreme Court delivered by Mr. Justice McReynolds in which he takes great pains, speaking for the entire court, to state the limitations upon the exception to the general rule that equity will not enjoin State officers in the enforcement of State statutes, in the following clear and vigorous language:

> "*Ex parte Young*, 209 U. S. 123; 52 L. Ed. 714; 13 L. R. A. (N. S.) 932; 28 Sup. Ct. Rep. 441; 14 Ann. Cas. 764, and following cases have established the doctrine that **when absolutely necessary** for protection of constitutional rights courts of the United States have power to enjoin State officers from instituting criminal actions. But this may not be done **except under extraordinary circumstances** where the **danger of irreparable loss** is both **great** and **immediate.** Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done. **The accused should first set up and rely upon his defense in the State courts, even though this involves a challenge of the validity of some statute,** unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of Federal questions. An intolerable condition would arise if, whenever about to be charged with violating a State law, one were permitted freely to contest its validity by an original proceeding in some Federal court. Hygrade Provision Co. v. Sherman, 266 U. S. 497, 500; 69 L. Ed. 402, 406"

Fenner v. Boykin, 271 U. S. 240, 243.

Finally we come to the recent case of *Massachusetts State Grange v. Benton*, 272 U. S. 525; 71 L. Ed. 387, in which Mr. Justice Holmes delivered the opinion of the court, particularly emphasizing the general rule and the limitations upon the exceptions to the rule in the following language (p. 527):

> "The court below found no inconsistency between the two acts, and we have seen no sufficient reason for differing from it upon that point. But it also went on the important rule, **which we desire to emphasize,** that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, **unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.** *Cavanaugh v. Looney*, 248 U. S. 453, 456; 63 L. Ed. 354, 357; 39 Sup. Ct. Rep. 142; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500; 69 L. Ed. 402, 406; 45 Sup. Ct. Rep. 141; *Fenner v. Boykin*, May 24, 1926 (271 U. S. 240; 70 L. Ed. 927; 46 Sup. Ct. Rep. 492).

In support of the opinion of Mr. Justice Holmes, a separate opinion was delivered by Mr. Justice McReynolds, from which the following quotations are pertinent:

> "Unless much said in *Ex parte Young*, 209 U. S. 123 * * * is trivial or nonsense, this is a suit against Massachusetts and beyond the possible jurisdiction of Federal courts, as expressly declared by the Eleventh Amendment. * * * The bill discloses a bald purpose to secure an adjudication in respect of the constitutionality of a State statute. In no just sense did it seek protection of any property right

threatened with unlawful invasion by an officer claiming to proceed under a void enactment."

Mass. State Grange v. Benton, supra., p. 529.

It will be observed that in none of the foregoing cases where the jurisdiction of the Federal courts was sustained, was there a situation presented comparable with that found in the present case. In no case had the law in question been sustained by the Supreme Court of the United States (or even by the Supreme Court of the State involved). In fact, the reason for a resort to the Federal court of equity is commonly the impending enforcement of an alleged law whose validity has received no judicial sanction:

> "Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative **until the constitutional question is judicially determined.**"

Public Service Co. v. Corboy, 250 U. S. 153, 159.

According to appellant's argument it would appear that **after** the constitutionality of a state law **has** been "judicially determined" litigants may continue to file suits based on the **jurisdictional** averment that the law although previously held constitutional is not sufficiently operative to make its enforcement the official act of a state officer. Such a doctrine would extend the authority of the Federal courts to a continuing supervision over state officers and an intermittent revision of state laws that would be an unprecedented invasion of the independ-

ence of executive department and of the independence of state sovereignty. In no previous case is presented the situation found in the present case where a law has been in effect for many years and has been accepted by the complainant itself for many years as the law. In no other case has been presented the situation in the present case, where the Supreme Court of the State and the Supreme Court of the United States long ago sustained the validity of the law as a proper exercise of the police power of the State, and where the complainant seeks to have the Supreme Court reverse its opinion and to hold the law to be not a proper exercise of the police power of the State.

It is observed, of course, that the complainant in the present case contends that laws have been passed by Congress since the enactment and sustaining of the Arkansas full crew laws, whereby Congress has occupied this field of legislation, and thereby excluded the exercise of the State police power. Yet, even these laws were passed many years ago, the Transportation Act in 1920, and the Railway Labor Act in 1926, and complainant has continued to live under the restrictions of the State law without seeking the immediate aid of a Federal Court of equity to prevent what it now calls "irreparable injury". We will discuss the merits of this contention of the appellant (that Congress has now occupied the field) subsequently in this brief, and we feel confident that this court will sustain the conclusions of the statutory court to the effect that Congress has not, in any way, evidenced an intention to regulate, or to commit to the regulation of the Interstate Commerce Commission, the number of employees who should be required to operate trains safely.

But, if this court agrees with the conclusions of the statutory court (that Congress has not occupied the

field), this court will have still left before it the question as to whether the bill of complaint sufficiently alleges facts which, if proved, would warrant a holding that the exercise of the police power of the State in the laws has been arbitrary and imposes an unreasonable burden upon Interstate Commerce. We do not believe that the allegations of the bill of complaint are sufficient to raise this issue and we believe there is a clear showing that the complainant had, and has, an adequate remedy at law.

But before proceeding to the discussion of these questions, we submit most earnestly that this suit has been begun in clear violation of the provisions of the Eleventh Amendment, and that it is far more important than the decision of any other issue involved in this case, to have a ruling that the limitations of the jurisdiction of the Federal Courts, under the Eleventh Amendment should be observed. We believe, to paraphrase the language used in *Fenner vs. Boykin*, supra, that "an intolerable condition" has arisen in this case whereby, when charged with the violation of a State law **which is**, by the decision of this court, **the law of the State of Arkansas**, the complainant has been permitted to sue the State of Arkansas in a Federal Court and to compel the officers of the State to defend their official acts in a Federal Court, to protect their right to exercise their authority and to fulfill their duties as State officers. The State of Arkansas is being sued by a citizen of the State of Missouri in the Federal Courts, despite the express mandate of the Constitution of the United States to the effect that "the judicial power of the United States shall not be construed to extend" to any such suit. We submit that the bill should be dismissed on the ground that the constitutional rights of the States can not be thus violated in the courts of the United States.

II.

The bill of complaint was properly dismissed because the complainant had a plain, adequate and complete remedy at law. The present case is remarkable because of the entire absence of the ordinary excuses for resorting to a court of equity to prevent the enforcement of the criminal law of a State. It may be admitted that—

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a State law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable."
>
> *Terrace vs. Thompson*, supra, p. 214.

> "But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate."
>
> *Fenner vs. Boykin*, supra, p. 243.

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute, even though unconstitutional."
>
> *Hygrade Provision Co. vs. Sherman*, supra, p. 500.

But (quoting again an opinion of this court) respect should also be paid to—

> "the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."
>
> *Mass State Grange v. Benton*, supra, p. 527.

When the bill of complaint in the present case is tested by the foregoing rules, it becomes apparent that the equity jurisdiction can not be sustained. The railroads of Arkansas have been operating for many years in conformity with the Arkansas full crew laws. The railroads in many other states have been operating for many years in conformity with similar laws (see Appendix). The other railroads in the State of Arkansas, and elsewhere in the United States, are continuing to operate under these laws without feeling the necessity of invoking the immediate aid of the injunctive process of the Federal Courts to save them from the "danger of irreparable loss" alleged to be "great and immediate", or to protect them from "injuries otherwise irremediable." The complainant could hardly suggest that this is a case "reasonably free from doubt", when the complainant asserts the unconstitutionality of state laws which have been in effect for many years in many states, especially when the particular state laws assailed have been explicitly held to be constitutional by the Supreme Courts of the State and of the United States.

Furthermore, it is interesting to note that in the very cases in which these Arkansas laws were held constitutional, it was not found necessary for the railroads affected to invoke the equity powers of the Federal Courts but, on the contrary, the laws were violated, small fines imposed, and the test case proceeded in an orderly fashion through the courts of the State to the Supreme Court of the United States. (See, *Chicago R. I. & P. R. Co. vs. Arkansas*, 86 Ark. 412; 219 U. S. 453; *and St. Louis I. M. & S. R. Co. vs. Arkansas*, 114 Ark. 486; 240 U. S. 518).

About all that can be said to support complainant's action in filing its bill is that an equity proceeding in the

Federal Court provides an easy method for the complainant to prevent the Supreme Court of the State of Arkansas from again passing upon the validity of a State law, and provides a "short-cut" to the Supreme Court of the United States. Yet, to use the language of this court, we may suggest that—

> "the fact is important that the controvery concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the State and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The Federal power is paramount, but public interest demands that whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the Federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to."

Lawrence vs. St. Louis-San Francisco Railway Company, 274 U. S. 588, 594.

In another recent case, this court held that a bill of complaint did not lie by the State of Georgia against the City of Chattanooga, where the case involved "a consideration of the meaning and proper application of the laws of Tennessee", and this court held "it is especially appropriate that the Tennessee courts shall first decide that question."

Georgia vs. Chattanooga, 264 U. S. 472.

It may be properly suggested in this case that since the Supreme Court of Arkansas first sustained these laws, and then this court approved those decisions of the Su-

preme Court of the State, if there is now an occasion for a re-examination of the issues of those cases, it would be at least appropriate, and certainly in the interests of comity and courtesy to require the complainant in this case to submit the issues first to the consideration of the courts of the State of Arkansas.

The threat of a multiplicity of suits provides no basis for the present proceeding, because the bill of complaint shows that suits were brought in Arkansas and fines imposed (which, under the law, are small) and all the complainant had to do to avoid a multiplicity of suits was to continue operating its railroad as it had been operating for years, in conformity with the laws of Arkansas, and appeal from the judgments entered against it for violation of those laws. Yet, so little was complainant injured by these suits that it did not even appeal from the judgments entered. (Rec. 18.)

The situation presented in this case is entirely different from that in which resort is ordinarily had to a court of equity. Where a new act has been passed by the legislature, or a new order entered by a regulatory commission, which imposes new expenses or heavy losses of revenue upon a public service company, or where a company can not continue operating in its customary manner without incurring a multitude of penalties or subjecting itself to numerous prosecutions, there may be some justification for an appeal to a court of equity to prevent great and irreparable injury, particularly where, on the face of the bill of complaint, a case is presented which seems "reasonably free from doubt". But, entirely different issues are apparent on the face of the present bill of complaint, in view of the decisions of this court upon the laws here involved, and in view of matters of common knowledge, of which the court will take judicial notice:

First, this is a suit against the State to which the judicial power of the Federal Courts does not extend. The legal fiction that a suit against State officers is not a suit against the State is here invoked to support an allegation contrary to fact. Second, the complainant is seeking merely to have the court review the **wisdom** of the exercise of an unquestioned reserved police power of the State. (The contention that Congress has occupied this field is thoroughly demolished by the opinion of the statutory court.) Third, the complainant had a full, adequate and complete remedy at law by setting up and relying upon its defense in the state courts.

The three-judge statutory court, in its opinion, stated that a property right of the plaintiff was involved, that prosecutions had taken place and others were threatened, and therefore "where a multiplicity of such prosecutions are involved, a court of equity may intervene, even though the effect is to enjoin the enforcement of criminal laws". (Rec. 115.) We suggest that the court failed to note that no multiplicity of prosecutions could take place except through a sudden determination of the complainant to begin wholesale violations of laws which had been held constitutional and had been enforced for years; and we submit that a complainant can not **create** an equity jurisdiction by deliberately adopting an unlawful course of conduct, when not under any pressure of necessity to prevent "great and irreparable injury", but simply because the complainant wishes to test again the constitutionality of laws which have been long upheld. The fear of consequences "which defendant can easily avert without loss or injury" does not justify a resort to equity.

Arkansas Bldg. Assn. v. Madden, 175 U. S. 269.

One of the two cases cited by the lower court in this connection is *Truax vs. Raich*, 239 U. S. 33, wherein it was held that a bill in equity could be sustained when "framed upon the theory that the act is unconstitutional, and that defendants who are public officers concerned with the enforcement of the laws of the state are about to proceed **wrongfully** to the complainant's injury". We would point out that in the present case, the acts in question, according to the decisions of this court, **are constitutional**, and that these decisions **are the law** until overruled by this court, and that this bill could not be properly framed on the theory that the prosecuting officers of Arkansas were proceeding **wrongfully.**

Our point is, in brief, that the law as laid down by the Supreme Court must be held to be the law in the federal courts, and that a federal court can not take jurisdiction of a bill of complaint on the basis of the mere contention of the complainant that the law should be **changed.** The laws of the State of Arkansas here involved are not merely "laws" because the legislature of the State of Arkansas enacted them, but they are entitled to **unqualified acceptance** as the laws of Arkansas because their validity has been sustained in the courts of last resort.

The "legal fiction" that a state official may be sued as an individual wrongdoer when he attempts to enforce a state statute becomes pure subterfuge when he is sued for enforcing a state statute which has been held constitutional. The attorney general of Arkansas is being sued in this case for performing his unquestioned official duty. Therefore the State is being sued, in defiance of the prohibition of the federal Constitution. And there is no shadow of an excuse for this subterfuge when the complainant has, as in the present case, a plain and complete remedy at law.

Under these circumstances, we submit that it is proper to apply the general principle that "the unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate, and complete remedy at law is so well understood as not to require the citation of authorities." *Terrace vs. Thompson,* supra, p. 214.

The principal argument of appellant upon this issue before the statutory court was to the effect that the remedy at law, in order to prevent the exercise of equity jurisdiction, must be a remedy at law **in the Federal Court,** and not merely in a State court. If this contention were sound, then the language previously quoted from the opinion of this court in *Fenner vs. Boykin,* supra, becomes meaningless. Obviously, there can be no remedy **at law** in the Federal Court for any defendant charged with violation of a state law, since the Federal Courts have no jurisdiction to enforce the penal statutes of a state. (*Gwin v. Breedlove,* 2 How. 29, 36; 11 L. Ed. 167.) The only remedy at law, by setting up and relying upon a defense against a penal statute, must be in the **state** courts. Yet, in *Fenner vs. Boykin,* and the preceding case of *Terrace vs. Thompson,* the opinions proceeded on the clearly stated ground that the unconstitutionality of a state law was not alone ground for equitable relief, but that a defense must be made **in the state courts** unless it "plainly appears that this course would not afford adequate protection."

We venture to quote again from the separate opinion of Mr. Justice McReynolds (not a dissenting opinion) in *Massachusetts State Grange vs. Benton,* supra, p. 529.

> "Unless much said in *Ex parte Young*, 209 U. S. * * * is trivial or nonsense, this is a suit against Massachusetts and beyond the possible jurisdiction of Federal Courts, as expressly declared by the Eleventh Amendment. * * * The bill discloses a bald purpose to secure an adjudication in respect of the constitutionality of a state statute."

We submit that this same language is applicable to the present suit, and, unless much that has been said in the ruling cases upon the issues herein is to be regarded as meaningless, this is a suit against the State of Arkansas, beyond the jurisdiction of the Federal Court and is, furthermore, a suit outside the equity jurisdiction of any court, because the complainant has an adequate remedy at law. If appellant's argument were correct, then almost any non-resident defendant in a state criminal prosecution could resort to a Federal Court of equity, although residents of the State could not resort to a State court of equity because of the existence of a plain and adequate remedy at law.

It seems apparent that the doctrine previously announced by this court (in *Risty vs. C. R. I. & P. Railway Co.*, 270 U. S. 378), which appellant has misapplied, did not refer to defendants who may be prosecuted for the violation of State laws, but rather to those suitors for civil relief in a Federal Court of equity who might have found a civil remedy **as plaintiffs** at law in the State courts, which was a remedy not available in the Federal Courts. Certainly, if the doctrine were as broad as appellant's contention, it is difficult to understand why, in *Ex parte Young* and other cases, this court has sustained the equity jurisdiction on the ground that the remedy in the State courts was "inadequate". If the remedy at law must always be found in the Federal Courts,

in order to bar the federal equity jurisdiction, it would not make any difference whether there was an "adequate" remedy or an "inadequate" remedy in the State courts.

We submit that the sustaining of equity jurisdiction in this case will certainly open wide the doors of the Federal Courts to a multiplicity of cases supposedly barred by the ancient rule of equity, which is written into the Judicial Code. (Judicial Code, Sec. 267.) Not only will all non-resident defendants be entitled to file bills in equity in the Federal Courts to enjoin the enforcement of State laws because of alleged conflict with the Federal Constitution, but even after the Supreme Court has sustained the constitutionality of the State law, further bills in equity may be filed alleging "changed conditions" or "new grounds", and a mass of litigation over State laws (including, for example, the innumerable regulations issued by state commissions) may be dragged into the Federal Courts, creating that "intolerable condition" against which this court has uttered a special warning in *Fenner vs. Boykin,* supra, which was then reiterated in *Massachusetts State Grange vs. Benton,* supra. In view of the well known fact that a considerable part of state police power regulations are operative today upon corporations which are citizens of other states, the present bill of complaint, instead of being (legislatively) described as, "a bill to annul the full crew laws of twenty-one states", should be comprehensively described as, "a bill to provide for the direct review of all state police power regulations by the Supreme Court of the United States." (Because, here is a class of cases in which a direct appeal to the Supreme Court from interlocutory orders and final decrees is a matter of right under Section 266 of the Judicial Code.)

Finally on this point, it may be suggested that the discussion in *Ex parte Young* of the comparative "ade-

quacy" of the remedies, by a bill in equity, or by setting up a defense in a criminal prosecution, gave tender consideration to the interests of the **defendant,** but somewhat ignored the interests of the **state.** It was held—

> "We do not say the company could not interpose this defense in an action to recover penalties, or upon the trial of an indictment, but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

Ex parte Young, supra, p. 165.

Perhaps it may be easier for the Missouri Pacific Railroad Company, a corporation with large financial resources and an enormous staff of expert engineers, statisticians and accountants, to present an impressive case to a three-judge statutory court than to interpose its defense in a state prosecution. But is it not appropriate to consider that the State of Arkansas, according to the procedure initiated by the complainant railroad, is to be placed in a very difficult position to make its defense, that is, to defend the sovereign power of the State?

According to customary procedure, according to the experience had in previous and pending cases of this character, it must be plain to members of the Federal bar and to the Federal judges that upon jurisdiction being taken, a three-judge statutory court would refer such a case to a master. (This is a practice persisting despite Equity Rule 46. See, *Los Angeles Brush Mfg. Co. v. James* (D. J.), 272 U. S. 701.) Whereupon the State would be compelled to advance thousands of dollars for master's fees, for stenographic costs, for expenses of witnesses, for the hiring of experts to reply to the well prepared experts employed by the railroad. Whereupon an

enormously expensive record would be made at great cost to the state, and if the statutory court should happen to decide against the state, then an exceedingly expensive appeal must be prosecuted to this court. Yet, according to the theory upon which jurisdiction is taken, the defending state officers are being sued as personal wrong-doers. Clearly, they could not be expected to pay from their own pockets such costs, far exceeding their official salaries. Yet, if the state is not the defendant, how can costs be taxed against the state? And if it be assumed that appropriations could be legally made by the state, the question would still remain: Would the officer be individually liable for costs when sued as an individual wrong-doer if the state should fail to reimburse him? But if the state assumes the burden of defense, is it equitable doctrine that a wealthy defendant can impose on a state (of perhaps inferior financial resources) the enormous cost and burden of a defense in equity to support the law of the state, and can impose this cost and burden upon the tissue fiction that the state itself is not being sued?

> "One of the causes for complaint of the general administration of justice is the expense it entails on the litigants, and so far as it reasonably may do so, this court is anxious to minimize the basis for such complaints."
>
> *Los Angeles Brush Mfg. Co. v. James*, (*D. J.*), 272 U. S. 701.

The question we would present is: Should the State be burdened with the extraordinary expense of a cumbersome, dilatory equity proceeding in order to protect its sovereign power, or should a violator of state law be required to make his defense in a speedy trial at law in the courts of the state? Which process encourages respect

for law and maintains the dignity of the State; and which is calculated to encourage disrespect for the law and to aid those seeking to evade legal responsibilities? This is a proper consideration for a court of equity, and is a question of public policy which merits the determination of the Supreme Court of the United States.

We submit that in view of the very practical considerations above briefly outlined, in view of the fact that the present defendant has a plain, adequate and complete remedy by setting up its defense at law and by appealing from judgments already rendered against it in the State courts, in view of the fact that the constitutionality of the laws which it assails have been sustained by this court, in view of the fact that there could be no great and immediate and irreparable injury suffered by this railroad if it should continue to operate under the requirements of laws which it has been meeting for over fifteen years; in view of the lack of equity plainly shown on the face of the bill of complaint, this bill, even it be held within the jurisdiction of the Federal Courts, should have been dismissed for want of equity, on the grounds rejected, as well as on those approved, by the statutory court.

III.

The bill of complaint was properly dismissed because it did not allege and properly plead facts which would warrant the court in adjudging that the Arkansas statutes were arbitrary exercises of the police power of the State.

The first point in the Appellant's Brief is to the effect that since the bill of complaint alleged a violation of the Fourteenth Amendment, it was error to sustain a motion to dismiss without examining the merits of the plaintiff's case "since the motion to dismiss admits the facts alleged, and all legal inferences attaching thereto." (Appellant's Brief, p. 22.)

> "We are not called upon to cite authorities, for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill."
>
> *Equitable Life Assurance Society vs. Brown*, 213 U. S. 25, 43.

> "The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this Court must decide, is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better. For if there are material facts of which the court would not inform itself, as in many cases it would, (*Prentis-vs-Altantic Coast Line Co.*, 211 U. S. 210, 277), an averment in this general form is not enough. *Southern R. Co. v. King*, 217 U. S. 524, 534, 535. Only facts well pleaded are confessed."
>
> *Pierce Oil Corp. vs. Hope*, 248 U. S. 498, 500.

"Did the court err in sustaining the demurrer to the amended answer? The circuit court of appeals held, and we think correctly, that an inspection of that document shows that it did not contain a proper averment of the facts, which would show that the operation of the statute in controversy was such as to unlawfully regulate interstate commerce, and, therefore, deprive the railway company of its constitutional right to carry on such commerce unhampered by such illegal restrictions. The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution, and a direct burden upon, and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mails and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional."

Southern R. Co. vs. King, 217 U. S. 524; 536.

To the effect that affidavits cannot supplement a bill of complaint, see also:

U. S. v. Marine Engineers Assn., 277 Fed. 830, 884.

McGregor v. Great Northern R. Co., 172 N. W. 841.

Applying the foregoing well settled rules, the appellant's bill of complaint does not state a cause of action in its allegations as to the unreasonableness of the police power regulation found in the Arkansas statutes. We summarized the allegations of the bill of complaint in

our Statement in the opening of the present brief, and pointed out that the allegations prior to the tenth paragraph of the bill of complaint amounted to nothing more than a reassertion of the same contentions previously made in this court, when the validity of these laws was assailed by railroads operating in Arkansas.

The complainant alleged that trains could be operated safely and more economically with smaller crews than required by the Arkansas laws "whenever the traffic and circumstances make such operation advisable" (Record 7). Complainant alleged that money could be saved by operating trains with smaller crews. But similar allegations were made when the Arkansas laws were originally sustained, and at that time, this court held that though there might be "some room for controversy as to whether the statute is, or was necessary" nevertheless, "it can not be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state legislature had in view."

Chicago R. I. & P. R. Co. vs. Arkansas, 219 U. S. 453.

The court, in the foregoing case, also held, p. 465:

> "It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits."

We submit that the possible economies which might be made by abrogating these full crew laws are not relevant to a determination of their validity, since "uncompensated obedience" to laws passed in the exercise of the police power is an obligation upon all citizens, and peculiarly an obligation of public service corporations.

Atlantic Coast Line R. Co. v. Goldboro, 232 U. S. 548.

Denver & Rio Grande R. Co. v. Denver, 250 U. S. 241.

Standard Oil Co. v. Marysville, 279 U. S. 582.

Erie Railroad Co. v. Board of Public Utility Comrs., 254 U. S. 394.

Railroad Com. v. Southern P. Co., 264 U. S. 331.

Lehigh Valley R. Co. v. Board of Public Utility Comrs., 278 U. S. 24.

The appellant, in its bill of complaint, not only failed to plead any facts which would show that these laws are now less needed than when they were sustained by this court, but on the contrary, its allegations of the fact (of which the court would take judicial notice) that "longer and heavier trains are now being operated" clearly indicates a greater need for requiring that they be operated by no less employees, than those required when the laws were originally passed and sustained. Appellant's allegation that "many more cars than those which could be safely operated when said laws were enacted, can now be operated in Arkansas and throughout the United States generally, more safely than smaller trains could then be operated", is a pure conclusion. But even if it could be regarded as an allegation of fact, it is not an allegation to the effect that longer trains can now be operated more safely with smaller crews, than the shorter trains of earlier years. Nor is such an allegation made. In truth, if the bill of complaint had contained any such allegation, it would be an averment so contrary to common knowledge and common sense that the court would not be required to give it any credence.*

*Interstate Com. Com. Report, 1930, p. 152 lists: 23010 freight conductors, 54118 freight brakemen; 21165 yard conductors, 51605 yard brakemen; which shows an average of nearly 2½ brakemen per train.

"Judicial notice can, and must be, taken even as against the averment of contrary conclusions in a pleading."

U. S. vs. Flournoy, etc., Co., 71 Fed. 572.

In addition to other facts, of which the court will take judicial notice, we call attention to the existence of similar full crew laws in a large number of states, as set forth in the Appendix to this brief, which show a general recognition of the need for such laws, and demonstrate that appellant's allegations concerning the "standard practice" of operating with smaller crews are unwarranted conclusions of the pleader. (Rec. 6.)

The court will note that some regulation of train crews has been in force for many years in some 21 states containing about 45% of the railway mileage of the United States; and that regulations identical with, or very similar to, those of Arkansas have been, and are being, enforced in Arizona, California, Nebraska, Nevada, New York, North Dakota, Oregon, Pennsylvania and Washington. These states present great varieties of climatic, geographical, social, industrial, and railway traffic conditions, providing conditions comparable with any that may obtain in Arkansas. In the light of the admissions in the bill of complaint, and in the light of facts of which the court has knowledge, complainant's conclusions as to "standard practice" are (to put it mildly) not well founded.

Similarly the allegations that a "standard crew" of one less brakeman than required in Arkansas is used generally upon railroads, is negatived by complainant's own qualification: "with the exception of the service in states with laws similar to the above laws of the State of Arkansas". (Rec. 8.)

The allegations of the bill of complaint up to the tenth paragraph, therefore, amount to no more than a petition to the court to re-examine the facts already passed upon by this court in sustaining the Arkansas laws. This re-examination is sought, not in the light of allegations of changed conditions which might lead to different conclusions, but in the light of changed conditions which have produced "longer and heavier" trains. Complainant invites only a reconsideration of the previous opinions of the court upon the basis of complainant's allegations of facts which still further fortify those opinions. Of course, it is the privilege of a complainant to ask for the overruling of previous judicial opinions. But it is likewise entirely appropriate for the defendants to move to dismiss such a bill, and for the court to sustain a motion to dismiss.

> "**Stare decisis** is a wholesome doctrine".
> *Kail v. Arizona*, 207 U. S. 201, 205.
>
> "A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts."
>
> *C. B. & Q. Ry. v. United States*, 220 U. S. 559, 577.

See also:

> *Twining v. New Jersey*, 211 U. S. 78.
> *Knop v. Monongahela Coal Co.*, 211 U. S. 485, 488.
> *N. Y. Life Insurance Co. v. Deer Lodge*, 231 U. S. 495, 502.

We submit that the motion to dismiss was properly sustained in this case because, where the state is exercising an admitted, reserved police power of the state, the following doctrine is clearly applicable:

"Every presumption is to be indulged in favor of the validity of the statute. *Mugler vs. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210. And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest."

Graves vs. Minnesota, 272 U. S. 425, 428.

"We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision. (Numerous citations.) * * *

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome."

Standard Oil Co. vs. Marysville, 279 U. S. 582, 584, 586.

The statutory court, in passing upon these allegations of the bill of complaint, sustained the motion to dismiss on the ground that "the validity of these two statutes has been sustained" (Record 115). The court found no basis in the allegations of the bill of complaint requiring a re-examination of the question as to whether the state police power had been unreasonably or arbitrarily exercised. We submit that the facts well pleaded in the

bill and those within judicial notice demonstrate that the Arkansas full crew laws are not an arbitrary exercise of the police power and that the bill stated no cause of action on this ground.

The statutory court then undertook consideration of "the second ground of the bill, which was "that Congress has occupied this field since the above decisions." And the court held, as a matter of law, that neither in amendments to the Interstate Commerce Act, nor in the passage of the Railway Labor Act, had Congress evinced any intention of occupying the field of regulation covered by the Arkansas full crew laws. Thereupon, the court reached the conclusion that "the petition states no cause of action, and for that reason, the motion to dismiss should be sustained".

We will, therefore, (without further discussion of the allegations of fact), proceed to a review of the allegations of law found in the bill of complaint in paragraphs X, XI and XII, on the assumption, which seems to be borne out by the Brief of Appellant, that the actuating reason for filing this bill of complaint was the belief of counsel for appellant that Congress had, since the sustaining of these laws, undertaken to occupy this field of legislation, and that, thereby, the power of the state, which had been constitutionally exerted in the full crew laws, had been superseded.

IV.

The bill of complaint was properly dismissed on the ground that the Congress has not undertaken to occupy the field of legislation covered by these (and similar) state statutes, and that, therefore, the state police power can be, and has been, validly exerted in this field.

The bill of complaint alleges that Section 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, gives the Interstate Commerce Commission jurisdiction to prescribe "the rate, classification, regulation or practice" to be adopted and put into effect by interstate carriers. It is further alleged that similar powers are given by Section 15 of the Interstate Commerce Act, as amended by the Transportation Act. It is also alleged that Section 15-a (added in 1920) gives the commission power to control the expenditures of the carriers, and thereby prevents the states from requiring such expenditures as are necessary to comply with the full crew laws of Arkansas and other states. (Record 11, 13.)

The foregoing contentions were argued at length before the statutory court and considered in detail, and found without merit, in the carefully reasoned opinion of that court. Possibly as a result of that opinion, counsel for appellant have laid their principal emphasis in the brief now submitted to this court upon **a contention not even mentioned in the allegations of the bill of complaint.** It is now contended (Appellant's Brief, pp. 25-45 and 51-58) that amendments were made also to Section 1 of the Interstate Commerce Act by the Transportation Act of 1920, which give the Interstate Commerce Commission a power to regulate "car service" and "the supply of trains" and that this delegation of power super-

sedes the previously sustained power of the state to enact full crew laws. Appellant makes the point that by the Transportation Act, the power of the Commission to regulate "car service" was expanded to include a power to regulate "the supply of trains". Then counsel for appellant proceed to the extraordinary conclusion that the power of the Interstate Commerce Commission to regulate "the supply of trains" includes, **by implication**, the power to regulate the number of employees who shall operate the trains. The argument seems to be this: that under Paragraph 14 of Section 1, the Commission has been given power to regulate the "practices with respect to car service by carriers by railroad subject to this chapter", and that, since the "supply of trains" is included within the term "car service" by Paragraph 10, therefore, the Commission has power to regulate all "practices" connected with the "supply of trains".

Of course, the word "practices" can be given an unlimited scope. This court has held, in construing this very word, in the Interstate Commerce Act, that "it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act"; and also that, "regarding only its broad generality, anything may be asserted of it". (*U. S. vs. Pa. Railroad Co.*, 242 U. S. 208, 228.) Furthermore, in construing this word, in the very sections referred to by counsel for appellant, this court has recently held—

> "The word 'practice', considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to

the acts or things belonging to the same general class as those meant by the words associated with it."

B. & O. R. R. Co. vs. U. S., 277 U. S. 291, 299.

It would be a pure waste of time to follow the details of the argument of counsel for appellant on this point. Their argument goes so far afield that counsel argue that the power of the Interstate Commerce Commission to regulate "the supply of trains" prohibits Arkansas from regulating "the length of freight trains" (Appellant's Brief, p. 34), and they urge that it is an unreasonable requirement "that freight trains shall not exceed twenty-five cars in length" (Appellant's Brief, p. 41), and they complain bitterly of "a state law limiting the length of freight trains to twenty-five cars" (Appellant's Brief, p. 45). Yet, there is not a line in the Arkansas laws limiting the length of freight trains! It seems hardly necessary to answer at length an argument of this character, particularly when counsel for appellant state in the same brief that the average freight train in Arkansas contains from fifty to seventy-five cars (Appellant's Brief, p. 80).

If appellant's construction of the powers of the Interstate Commerce Commission in regulating "practices" concerning "car service" and concerning "the supply of trains" were accepted, a large body of laws covering long-standing and valuable state regulation of railroads would be annulled. Such a construction is only possible by shutting the eyes to the plain meaning of the words used in the Interstate Commerce Act and to the decisions of this court construing those words, which counsel for appellant have omitted entirely from their brief.

The term "car service" is defined in Paragraph 10 of Section 1 of the Interstate Commerce Act and this definition is interpreted by the Supreme Court in *Peoria & P.*

U. R. Co. vs. United States, 263 U. S. 528. In that case this court held that the Interstate Commerce Commission did **not** have authority to require switching to be done through the provisions giving it powers in connection with "car service." This court held:

> "But 'car service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them. Cars and locomotives, like tracks and terminals, are the instrumentalities. To make these instrumentalities available in emergencies to a carrier other than the owner was the sole purpose of sub-paragraphs a, b, and c. It is to this end only that provision is made by Paragraph 10 for the 'movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property.' This is substantially the same expression as was used in the Esch Car Service Act. **The 1920 Act merely adds locomotives and other vehicles.**"
>
> *Peoria & P. U. R. Co. v. U. S.* 533, supra.

In a footnote to the foregoing case it is pointed out that when present paragraph 10 was under consideration in the House of Representatives in the 66th Congress, the House Committee on Interstate and Foreign Commerce reported an amendment extending the definition of "car service" to include the supply, **movement and operation** of trains by any carrier subject to this Act." (House Report 456, 66th Congress, 1st Session, p. 17.) It is most significant that the black faced words, including the **movement and operation** of trains, were **omitted** when this amendment was finally passed in the Transportation Act of 1920. Thus it is made plain that Congress decided deliberately **not** to give the Interstate Commerce Commission power to regulate the "movement and operation' 'of

trains. Yet appellant is now seeking to have this power written into the Act by judicial construction—not construction to carry out the legislative intention but to thwart it.

The true legislative intent is shown clearly in the case just cited, *Peoria & P. U. R. Co. v. United States*, 263 U. S. 528; see footnote on page 533.

> "Construction may not be substituted for legislation."
>
> *U. S. v. Mo. Pac. R. Co.*, 278 U. S. 269, 280.

Paragraphs 15, 16 and 17 of Section 1, which also refer to "car service", and confer **emergency** powers upon the Commission, have been strictly construed to cover **only** emergency powers.

> "The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed." (Many citations.)
>
> *Avent v. U. S.*, 266 U. S. 127, 130.

See also:

> *U. S. v. Koenig Coal Company*, 270 U. S. 512.
> *Baltimore & Ohio R. Co. v. U. S.*, supra.

It seems unnecessary to multiply citations at this point. The powers of the Commission in regard to "car service" are powers purely for the purpose of insuring a proper distribution of cars and locomotives and have no relation whatsoever to the regulation of the number of employees, or to protecting the public safety through providing sufficient employees to properly man trains.

This construction of "practices with respect to car service" as found in Section 1 of the Interstate Commerce Commission is fortified by the cases hereafter cited construing the word "practices" in Sections 13 and 15 which are alleged by appellant to give the Commission power to regulate train crews.

After the foregoing brief disposition of appellant's contentions which are not based on any visible allegations in the bill of complaint, let us consider those sections of the Interstate Commerce Act, as amended, which are referred to in the bill of complaint.

Sections 13 and 15 of the Interstate Commerce Act do not give the Interstate Commerce Commission authority to regulate the number of employees.

Section 13 of the Interstate Commerce Act was amended in 1920 by the addition of the last two paragraphs now numbered (3) and (4). Authority is given to the Interstate Commerce Commission to investigate any "rate, fare, charge, classification, regulation or practice" made or imposed by authority of any State and if it finds "that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable charge, preference or prejudice as between persons or localities * * * or any undue, unreasonable or unjust discrimination which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare or charge or maximum or minimum, or maximum and minimum thereafter to be charged and the classification or practice thereafter to be observed in such manner as in its judgment will remove such charge, preference, prejudice or discrimination."

A mere reading of the foregoing provisions shows that the authority conferred upon the Commission is simply an extension of the authority previously conferred "to promote and facilitate commerce by the adoption of regulations to make **charges** for transportation just and reasonable and to forbid undue and unreasonable **preferences or discriminations.**" This was (and is) the main purpose of the Interstate Commerce Act—as held in *Texas, etc., R. Co. v. Interstate Commerce Commission,* 162 U. S. 197, 233.

The "classification, regulation or practice" to be investigated or prescribed is clearly one having a relationship to a "rate, fare, or charge." It would be a strange construction of legislation to find in one section which is clearly intended to protect shippers against unfair rates, preferences or discriminations, a wholly different purpose —to authorize the Commission to determine what railroad operating conditions are necessary or desirable to protect the safety of the public and of employees. By all rules of statutory construction, "rates," "classifications" and "practices" are here grouped together in dealing with **one subject,** that is, equal and fair treatment of shippers. *Noscitur a sociis.* However, we are not required to construe the amendments of Section 13 without the aid of prior construction, because similar words were used in Section 15, as amended in 1910 and were construed by the Supreme Court of the United States prior to the adoption of the amendments to Section 13 in 1920. It must be held that the amendments to Section 13 in 1920 were written with full understanding of the construction which had been previously placed upon the word "practice," as found in Section 15—to which we will now refer.

Section 15 as amended by the Act of June 18, 1910, provided that the Commission could investigate and reg-

ulate a "rate, fare, charge, classification, regulation or practice." (We note that these are exactly the same words that are used in the 1920 amendment to Section 13.) These words were construed by the United States Supreme Court in the case entitled *United States v. Pennsylvania Railroad Company*, 242 U. S. 208, which was decided December 11, 1916.

In that case the railroad obtained a decree enjoining the enforcement of an order of the Interstate Commerce Commission requiring the carrier to provide and furnish tank cars to shippers. It was claimed, in behalf of the Commission, that the word "practices" should be construed to give to the Commission authority to compel a railroad to furnish this special facility. The Supreme Court, therefore, stated (p. 229) that "the question, then, is whether the neglect to provide it, or to furnish it was a 'practice' within the meaning of Section 15." The court held:

> "The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well-known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purposes as its associates. And there were many such acts for which the word could provide —practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one."
>
> *U. S. v. Penn. R. Co.*, 242 U. S. 208, 229.

Later in its opinion the court discussed further the effect of thus broadly enlarging the powers of the Commission, without any basis in legislative discussion or rec-

ommendations of the Commission that such authority should be given the Commission, and continued:

> "Indeed, there is intimation that such result would be radical and, as said by the railroad company, 'the Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful specific rules.' And we may further say with the company that 'it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the provisions of the act to regulate commerce are broad enough to cover matters of this kind?' And there is strength in the observation of the railroad company that if the argument based upon the word 'practice' or 'practices' were sound, **'it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act,** why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers?"

U. S. v. Penn. R. Co., supra, at page 232:

The foregoing case is cited with approval in *Baltimore & Ohio Railroad Company v. U. S.*, 277 U. S. 291, decided May 21, 1928. In the latter case the Interstate Commerce Commission had entered an order in respect of charges for transporting certain Westbound through traffic, from lines East of the Mississippi at East St. Louis

to lines West of the river at St. Louis. The Commission held that the "practice" of the East side lines in requiring the West side lines to bear the transfer charges on West-bound freight traffic was unjust and unreasonable and that a just and reasonable "practice" would be for the East side lines to bear such transfer charges. The following excerpt from the opinion of the court is pertinent:

> "In holding that the matter in controversy is a 'practice' within the meaning of the Act, the Commission relied on Sec. 1 (6) and (11) and Sec. 15 (1). Paragraph (6) makes it the duty of carriers to establish just and reasonable regulations and practices affecting classifications, rates or tariffs. Paragraph (11) requires them to furnish an adequate car service and to establish just and reasonable rules, regulations and practices, and declares to be unlawful every unjust and unreasonable rule, regulation and practice in respect of car service. The phrase 'car service' is defined by Par. (10) to include the exchange, interchange and return of locomotives, cars and other vehicles and also the supply of trains used by any carrier. Paragraph (1) of Sec. 15 provides that whenever the Commission shall be of opinion that any individual or joint rate or classification, regulation or practice is or will be unjust or unreasonable, the Commission may prescribe just and reasonable rates, classifications, regulations or practices.
>
> "The word 'practice,' considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to con-

fine its application to acts or things belonging to the same general class as those meant by the words associated with it. *United States v. Pennsylvania R. Co.*, 242 U. S. 208, 229, 61 L. Ed. 251, 264, 37 Sup. Ct. Rep. 95. When regard is had to that rule and the restrictions required to give the word a reasonable construction, it seems quite clear that 'practice' as used in the provisions relied on by the Commission, does not include or refer to the method or basis used by the connecting carriers for their divisions of rates or revenues. And this is so whether the revenues are derived from joint rates or from combination through rates."

B. & O. R. Co. vs. U. S., 277 U. S. 291, 299.

From the foregoing cases a rule of construction is provided: that the word "practice" when "considered generally and without regard to context, is not capable of useful construction." The word must be interpreted in connection with other words with which it is associated. It must be applied to acts and things more specifically described in the same or other sections of the Interstate Commerce Act. To quote again from the last opinion (page 300) "Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it."

Congress has never shown in any provision of the Interstate Commerce Act any intention to regulate, or to give to the Interstate Commerce Commission any authority to regulate, the number of employees. Congress has never shown any intention to regulate directly or indirectly the make-up, manning or operation of trains, so as to insure safe operation and protection of the public and employees, except in those instances where Congress has

made some specific provision as in the Safety Appliance Acts.

> "The Interstate Commerce Commission has never assumed control over the manner in which trains shall be made up, or manned, or moved, so far as I know," said Mr. Justice Clarke in *Penn. R. Co. v. Pub. Serv. Com.*, 250 U. S. 566, 570.

In the Safety Appliance Acts Congress has acted to give **specific** and **not general** power and, therefore, has not sought to occupy the entire field of protecting safe operation, so as to exclude the states from exerting their police power. This is pointed out in the opinion of the Supreme Court in *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605, where the court held that the Safety Appliance Act did not manifest an intention to occupy "the entire field regulating locomotive equipment," because, in the language of the court—"Obviously it did not do so by the Safety Appliance Act since its requirements are specific." (p. 611.)

The numerous cases cited in the brief of appellant in support of its contention that Congress has occupied the field by the use of the vague word "practice" in Sections 13 and 15 are in fact authorities **against** appellant's contention, when the cases are carefully examined. The following examples should suffice:

In *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341, (Appellant's Brief, p. 60) it was held that a form of bill of lading had not been prescribed for the particular shipment in question. But the answer to the question as to whether Congress had evinced an intention to regulate all bills of lading, was found in the provision in Section 1, Paragraph 6 of the Interstate Commerce Act which **specifically** prescribed (in the language of the court) "a gen-

eral rule applicable to all regulations and practices affecting the form or substance of bills of lading, in order that they may be just and reasonable. And the Commission is empowered and directed to enforce the rule." Thus it was made plain that Congress had occupied this specific field so as to exclude all State authority. On the other hand, it is equally clear that Congress has not anywhere in the Interstate Commerce Act made any "general rule" regarding the number of employees, or imposed any duties on either carriers or the Interstate Commerce Commission in this regard.

Another case cited by counsel for appellant is authority for the exact opposite of counsel's contention: *Midland Valley Railroad Company v. Barkley*, 276 U. S. 482, 48 Supreme Court Reporter 342, is cited (Appellant's Brief, pp. 58, 63) with the statement that in this case the Supreme Court had held there was "exclusive jurisdiction" in the Interstate Commerce Commission and that "jurisdiction of the State court under Section 895, Crawford and Moses Digest of the Statutes of Arkansas, was held superseded." It is true that in this case the Supreme Court held that the reasonableness of the rule adopted by the carrier was a matter to be determined by the Interstate Commerce Commission. But the opinion of the court concluded with these significant words (p. 487.):

> "**Nor need we determine whether,** by the amendments of the Interstate Commerce Act made in Transportation Act (February 28) 1920, Chap. 91, Sec. 402, Paragraphs 10-17, 41 Stat. at L. 456, 476, and the Act of September 22, 1922, Chap. 413, 42 Stat. at L. 1025, **Congress evinced the intention to occupy the field** of regulating the distribution of coal cars; and thereby abrogated the pre-existing

limited right to sue in a state court for failure to supply cars."

This case is, therefore, **not** an authority in support of plaintiff's contention, but a distinct authority in support of defendant's contention that the intention of Congress to occupy a particular field to the exclusion of the State must be "clearly manifested." *Napier v. Atlantic Coast Line Railroad Company*, 272 U. S. 605.

Section 15 (a) does not give the Interstate Commerce Commission authority to regulate the number of employees.

In view of the cases heretofore cited, appellant's contentions as to Section 15 (a) can be briefly disposed of. This section opens with the definition that "the term 'rates' means rates, fares and charges and all classifications, regulations and practices relating thereto." This definition alone should answer appellant's argument. "Practices" which bear an immediate relationship to **rates** come within the **rate regulating** jurisdiction of the Commission. But if any "practice" which can have any **possible** effect upon rates is to be included within the regulatory power, it would follow that every single activity of a railroad would be subject to intimate control by the Interstate Commerce Commission. We refer again to the case of *Baltimore & Ohio Railroad Company v. U. S.*, 277 U. S. 291, heretofore cited (p. 299):

> "The word 'practice' considered generally and without regard to context is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do."

By the terms of Section 15 (a), the Commission in fixing rates is required to give due consideration to the financial needs of the carriers "under honest, efficient

and economical management." Thereby the Commission is relieved of any obligation to satisfy financial needs arising from dishonest, inefficient or wasteful management. But this is wholly **negative** power conferred upon the Commission—to refuse relief from embarrassments caused by dishonesty, inefficiency or waste. The Commission has been given **no affirmative** power to regulate the discretion of management, to determine what practices are efficient and economical and to order them put into effect. Such a power would reverse the entire theory of private operation, which was responsible for the return of the railroads to their private owners and the passage of the Transportation Act of 1920. With all the powers conferred upon it the Interstate Commerce Commission has not yet been made the manager of the railroads. This court held that "in no proper sense is the public a general manager," in *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108. This case is cited with approval by this court in support of the following holding:

> "It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."
>
> *Missouri ex rel. v. Public Service Commission*, 262 U. S. 276, 289.

There is no justification for the allegation in the bill of complaint, Paragraph XI, that under Sections 13, 15 and 15 (a) the Interstate Commerce Commission "is given authority not only to fix the rates so as to provide a reasonable return upon the property, but also to regulate the expenditures consistent with proper and efficient

operation and economical management." There are specific provisions in the Interstate Commerce Act giving the Commission authority to require, for example, the installation of safety devices, which may, of course, impose expenditures upon railroads. But no **general** authority to regulate expenditures, or to order carriers to adopt practices which the Commission regards as efficient or economical, has ever been **granted, or** ever **exercised** by the Commission.

Not one of the "economy and efficiency investigations" cited in appellant's brief (pp. 49, 50) resulted in a Commission **order.** The Commission merely investigated and reported what it found.

Cases heretofore and hereafter cited show the extent to which this court always required the showing of a **specific** grant of authority before it would find the Commission authorized to exercise authority. These holdings are, of course, consistent with the established doctrine that an administrative body cannot be given the power to legislate, to create its own authority. Powers must be specifically conferred and only the details left to administrative discretion. The railroads of the country themselves have been the most persistent opponents of any efforts on the part of the Commission to take unto itself general powers and to exercise any general control of the operations of the carriers.

> "The Congress may not delegate its purely legislative power to a Commission, but, having laid down the general rules of action under which a Commission shall proceed, it may require of that Commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S. 194, 214.

To the same effect:

Wichita R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, 58.

"A proper statute would seem to require **detailed directions**, and we should expect the intention to be manifested in **plain** terms and not to have been left to be implied from varied regulatory provisions of **uncertain scope.**"

Interstate Com. Com. v. U. S. ex rel., Los Angeles, 280 U. S. 52, 69.

The final contention in the bill of complaint as to federal legislation occupying the field of the state police power is that this has been done in the passage of the Railway Labor Act of 1926.

The Railway Labor Act has no possible effect upon the exercise of state police power.

Appellant's contention in regard to the Railway Labor Act should be disposed of by a mere inspection of the provisions of that law. In brief summary they are:

1. That it is the duty of carriers and employees to make and maintain agreements concerning rates of pay, rules and working conditions.

2. That agreements should be made and disputes should be determined in conferences between representatives of the respective parties duly authorized to act.

3. That in the case of unsettled disputes, the services of the federal Board of Mediation may be invoked or proffered to aid the parties to reach an agreement. This

Board is given absolutely no power to decide disputes. It exercises no regulatory authority whatsoever.

4. That if conference and mediation fail, the parties may agree to arbitrate. But no arbitration can be forced upon the parties.

5. That, if a dispute cannot be settled by conference or through the aid of mediation or arbitration and threatens to interrupt commerce, the President may appoint an emergency board, which will make a report to the President. The recommendations of the emergency board are **not** made enforceable.

It is quite clear, upon a mere reading of the Act, that it does not involve the exercise of any compulsory power of the State to determine wages and working conditions by legislative action. It provides only for agreements between carriers and employees and for the aid of public officials in bringing about such agreements. (See, *T. & N. O. R. Co. v. Bro. of Ry. Clerks*, 281 U. S. 548.) Necessarily all such agreements are subject to the limitations found in federal statutes regulating interstate commerce, or state statutes passed in the exercise of the police power.

The bill of complaint in Paragraph XII (Rec. 14) admits that federal statutes would limit the agreements of the parties but alleges an intention of Congress to relieve the parties from the prohibitions of any state statute. Such a contention is insupportable, as may be shown by one example. Consider the existence of a state statute requiring a flagman at grade crossings, such as was required by the ordinance of Memphis, described in a case hereafter quoted. *N. C. & St. L. R. Co. v. White*, 278 U. S. 456. Could it be contended that railroad employees and railroads could make an agreement providing that no flagman should be maintained? Can railroad employees

and railroads enter into agreements to bargain away the police power of the State and to nullify laws passed in the exercise of such power? Can it be contended that Congress, in authorizing and aiding in the making of agreements between carriers and their employees, has intended to substitute private agreements as to what shall constitute safe operation for the exercise of the police power of the states? It must be obvious that Congress **has not passed** such a law and **could not pass** such a law. The citation of the Railway Labor Act by the plaintiff indicates the entire want of merit in its contentions that federal regulation has occupied this field to the exclusion of the state police power.

Counsel for appellant make the startling assertion that Congress "by the Labor Act of 1926 has thus definitely empowered the United States Railroad Labor Board to fix and determine 'rules and working conditions' in all the different branches of the service" * * *. The fact is that the "United States Railroad Labor Board" was **abolished** by the Railway Labor Act of 1926. The present "Board of Mediation" which was **created** by the Act of 1926 has no power "to fix and determine" any "rules and working conditions." Of course counsel for appellant can hardly be expected to construe or apply an Act of Congress correctly until they are sufficiently familiar with it to be able to state its provisions with reasonable accuracy.

V.

The statutory court properly declined to hold that Congress had occupied this field of State legislation and assumed power to regulate the number of employees required to operate trains in the absence of clear language manifesting such an intention.

The intention of Congress to exclude exercise of State police power must be clearly manifested. *Napier v. Atlantic Coast Line R. Co.* 272 U. S. 605.

The principles laid down by this court may be summarily stated in the following quotations from three cases:

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."
>
> *Sherlock v. Alling*, 93 U. S. 99, 103.

> "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to regulation of Congress within the sphere of its delegated power. * * *
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied un-

less the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

Savage v. Jones, 225 U. S. 501, 533.

"The question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623, 42 L. Ed. 878, 881, 18 Sup. Ct. Rep. 488.

Examples of the application of the foregoing rules will be found in the following cases:

It was held that laws regulating navigation with a view to safety and providing for liability in certain cases did not prohibit application of a state liability statute to an accident occurring in navigable waters of a state. *Sherlock v. Alling*, supra.

It was held that the Interstate Commerce Act did not prohibit state laws requiring locomotive engineers to undergo examinations. *Smith v. Alabama*, 124 U. S. 465.

It was held that the Federal Act forbidding transportation of diseased cattle did not prevent a state from imposing civil liability for damages because of importation of diseased cattle. *Missouri, K. & T. R. Co. v. Haber*, supra.

It was held that the Federal Animal Industry Act did not prevent states from penalizing importation of cat-

tle without inspection by state officials. *Reid v. Colorado*, 187 U. S. 137.

It was held that a Federal prohibition of importation of adulterated food did not prevent states from preventing sales of adulterated food. *Crossman v. Lurman*, 192 U. S. 189.

It was held that the Federal Animal Industry Act did not prevent certain state legislation on the same subject. *Asbell v. Kansas*, 209 U. S. 251.

It was held that the power granted to the Interstate Commerce Commission to compel equal switching service did not, in absence of exercise by the Commission of its power, prohibit states from legislating on the subject. *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612.

The case last cited deserves special attention because the court there lists a large number of cases, wherein the police power of the state has been upheld, notwithstanding the constitutional authority of Congress to regulate interstate commerce, and in answer to the claim that the Interstate Commerce Commission had been created and given "a large measure of control over interstate commerce," the court held. (p. 623).

> "But the fact that Congress has entrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. **A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the**

authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the Commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and a delegation of that control to a commission necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the Commission the control of the state over these incidental matters remains undisturbed."

This decision in 211 U. S. 612 was cited with approval in *Morris v. Duby*, 274 U. S. 135, 144, but "counsel for the Missouri Pacific" are still arguing that the Supreme Court is wrong and state police power may be annulled without specific exercise of the federal power to regulate the same subject.

It is appropriate to call attention here to the language of this court in upholding one of the laws now in question, where it was held:

"Undoubtedly, Congress in its discretion, may take entire charge of the whole subject of the equipment of interstate cars, and establish such regulations

as are necessary and proper for the protection of those engaged in interstate commerce. But it has not done so in respect to the number of employees to whom may be committed the actual management of interstate trains of any kind. It has not established regulations on that subject, and until it does the statutes of the State, not in their nature arbitrary, and which really relate to the rights and duties of all within their jurisdiction, must control. This principle has been firmly established, and is a most wholesome one under our systems of government, federal and state."

C., R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 466.

We will continue with our review of decisions concerning the survival of state police power.

It was held that the Food and Drugs Act of 1906 did not prevent states from regulating sales and requiring statements of ingredients to be affixed to certain articles. *Savage v. Jones,* 225 U. S. 501.

It was held that notwithstanding federal regulation of a carrier's liability for loss of interstate shipments, a state could provide for the allowance of an attorney's fee. *Missouri, K. & T. R. Co. v. Harris,* 234 U. S. 412.

It was held that the Federal Safety Appliance Acts, dealing with locomotive equipment did not preclude state legislation concerning locomotive headlights. *Atlantic Coast Line R. Co. v. Georgia,* 234 U. S. 280.

[It is to be noted that a subsequent amendment to the Boiler Inspection Act, increasing federal control by specific legislation was necessary to exclude the state authority upheld in the foregoing case. *Napier v. Atlantic Coast Line Railroad Company,* 272 U. S. 605.]

It was held that the Federal Food and Drugs Act did not prevent a state from penalizing the shipment of fruits unfit for consumption. *Sligh v. Kirkwood*, 237 U. S. 52.

It was held that "the question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the state must be answered by a judgment in the particular case." *Pennsylvania Railroad Co. v. Public Service Commission*, 250 U. S. 566, 569.

A reference to the case last cited is particularly apt, because in the dissenting opinion of Mr. Justice Clarke appears the previously quoted statement (which is not questioned in the majority opinion) p. 570:

> "The Interstate Commerce Commission has never assumed control over the manner in which trains shall be made up, or **manned**, or moved, so far as I know,—certainly there is nothing in the record in this case to indicate that it has done so."

It was held that a Public Service Commission could require a railway company to construct and maintain a roadway for vehicles crossing its tracks and impose certain duties concerning the use and protection of the crossing; the opinion of this court including the following statement of law:

> "The state, in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them."
>
> *Norfolk & W. R. Co. v. Public Service Commission*, 265 U. S. 70, 74.

It was held that state regulation to promote safety "is valid, even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Buck v. Kuykendall,* 267 U. S. 307; *Morris v. Duby,* 274 U. S. 135, 144.

We may conclude this review of the cases showing the extent to which the reserved police power of the states must be upheld, unless there is a clear exercise of the federal power to occupy the entire field of regulation, with the citation of a recent case which is peculiarly pertinent to the present case.

In *Nashville C. & St. L. R. Co. v. White,* 278 U. S. 456, a railroad had been held liable for death and injuries at a railroad crossing, for which the proximate cause was the railroad's failure to comply with an ordinane of the City of Memphis, requiring a flagman to be kept constantly on duty. The opinion stated: "The validity of this ordinance is the only question open before us." The railroad had substituted an electric signal for the flagman and claimed this was a cheaper and in some ways a better protection. The opinion of the court reads in part as follows (p. 459):

> "The railway contended that the ordinance enacted at the beginning of 1880 was valid no longer, in view of the modern improvement, and that to enforce it now would be to enforce an unnecessary burden on interstate commerce and would be so arbitrary as to amount to a denial of due process of law. *Galveston Electric Co. v. Galveston,* 258 U. S. 388, 400, 66 L. Ed. 678, 685, 42 Sup. Ct. Rep. 351. (It may be mentioned that the train concerned was engaged in interstate commerce.) But the crossing in

question was said by the court to be a dangerous one, where there was pretty constant travel by night and day, and it was held that as applied to such a crossing it could not be said that the ordinance was so indisputably unnecessary and unreasonable that the legislative judgment could be overruled.

"We are compelled to take the same view. The legislative arguments in favor of the railway are manifest, and we may conjecture that it is only a matter of time before the old methods of guarding grade crossings will have disappeared unless the grade crossings precede them. But if the ordinance were passed today and came up for a decision upon its validity, it could not be denied that a man in the middle of the street, or near to it, and intent on stopping traffic, might stop some travelers who might not notice electric signs. **There is a marginal chance that occasionally a life may be saved.** In this very case it is at least possible that a man on the ground would have stopped the plaintiffs, they not being intent on suicide. No doubt legislatures do neglect such marginal chances. Many modern improvements must be expected to take their toll of life. When a railroad is built experience teaches that it is pretty certain to kill some people before it has lasted long. But a court cannot condemn a legislature that refuses to allow the toll to be taken, even if it thinks that the gain by the change would compensate for any such loss. It follows that we must affirm the judgments below. See, *Zahn v. Board of Public Works*, 274 U. S. 325, 328, 71 L. Ed. 1074, 1076, 47 Sup. Ct. Rep. 594."

N. C. & St. L. R. Co. v. White, 278 U. S. 456.

State Police Power alone can protect the public at the present time.

The following facts must be evident from the previous decisions sustaining the Arkansas Full Crew Laws; from the existence of regulations of the number of employees in twenty-one other states, cited in the Appendix to this brief and from matters within judicial knowledge:

1. These laws were enacted to protect the public safety of all engaged in business or domiciled within the limits of the State of Arkansas.

2. The regulation of the number of employees to whom may be committed the management of trains has a real relation to the safety of train operation and to the safety of the public traveling on highways crossed by trains.

3. With the constantly increasing length of trains and the enormous increase in the number of vehicles upon public highways which cross railroad tracks, there is a much greater need today than ten or twenty years ago for a sufficient number of employees to protect train operations and to protect the public at highway crossings.

The court will take judicial notice of the following significant figures:

Revenue tons per train in 1910=380; in 1929=730; according to Annual Report of Interstate Commerce Commission, 1930, p. 135.

Motor Vehicle Registration in 1913=1,258,000; in 1925=19,954,000, according to Statistical Abstract of U. S., 1925; and in 1929=26,501,443, according to Ann. Rep., Inter. Com. Com. 1930, p. 43.

4. The difference between a full crew and an inadequate crew must inevitably bring death and injury to residents and travelers in the State of Arkansas who are entitled to protection through the State police power.

5. Even if railroads **could** operate and **do** operate with less than the Arkansas "full crew" there is "a marginal chance that occasionally a life may be saved" in Arkansas because of its full crew laws.

Recognizing the above facts, we submit that, in the language of this court, "a court cannot condemn a legislature that refuses to allow the toll (of life) to be taken." These laws were passed many years ago, but they were upheld by the electorate of Arkansas voting upon them on referendum in 1926. The legislative judgment originally exercised by the legislature was thus affirmed by popular verdict upon a referendum.

The present complaining Railroad must admit that the court could not be asked even to consider granting an injunction against the enforcement of these laws, unless it were made clear to this court that the federal government in the exercise of its powers to regulate interstate commerce had taken over itself the **duty** and **obligation** of protecting the people of Arkansas and all the other states, by requiring adequate manning of all trains, both interstate and intrastate. But this would be an action by the federal government of grave and far-reaching importance, not to be implied as evidenced in a vague phrase or two.

Since highway crossings are protected, not only by watchmen stationed there, but also by the crews of trains passing over, and switching over, such crossings, it is clear that Congress, in order to exclude the police power of the states, would be required to assume **and to exer-**

cise far-reaching powers, not only over crews of trains, but over other means of protecting highway crossings. Yet there is not a word in all the Interstate Commerce Laws passed to this day even providing specifically that trains shall be adequately manned, or conferring any power upon the Interstate Commerce Commission to require that trains be adequately manned. It is contrary to all the principles laid down in the foregoing cases to contend that the conferring of such vast powers upon the Interstate Commerce Commission, and the excluding of the states from police powers which have been exercised by practically all the states (either by regulating the number of employees or in requiring protections for grade crossings), is to be implied from vague and general terms, such as the word "practices" as used in Sections 1, 13 and 15 of the Interstate Commerce Act.

In the protection of public safety at highway crossings the police power of the state is paramount.

Erie Railroad Co. v. Board of Public Utility Comrs., 254 U. S. 394.

Railroad Com. v. Southern P. Co., 264 U. S. 331.

Lehigh Valley R. Co. v. Board of Public Utility Comrs., 278 U. S. 24.

VI.

If Congress had empowered the Interstate Commerce Commission to regulate train crews, appellant should have applied to the Commission before filing a bill in equity and its premature bill should have been dismissed.

This final point may be made in support of the action of the statutory court dismissing the present bill of complaint, although it may seem unnecessary in view of the many reasons for the order of the court. If it were a fact that Congress **had** delegated to the Interstate Commerce Commission the power of regulating the number of employees to operate trains, there would be no basis for the present bill of complaint, because the complainant did not previously invoke the investigation and decision of the Interstate Commerce Commission upon this subject matter. The contention of counsel for appellant as stated below, was that Congress had legislated that train service and train supply must be "safe" and "adequate" and that "the Commission is required to see that they are". If any such authority **had** been delegated to the Commission, it would then have been the duty of the present appellant to have applied to the Interstate Commerce Commission for an investigation and determination of the number of employees needed for "safe" and "adequate" service, because, as held by this court, "a mere delegation by Congress to the Commission of a like power has no greater effect, and does not, of itself, disturb the authority of the state".

Missouri Pacific Railway vs. Larabee Mills, 211 U. S. 612.

The following brief review of the opinions of the Supreme Court pertinent to this issue will make it clear that

if Congress should, at any time, delegate authority to the Commission to enter upon the field in which the state police power has been effective and undisturbed up to the present time, the mere enactment of such a law would not immediately wipe out all safety regulations imposed by authority of the state. Such a result would be unconscionable, exposing the people of the states to the sudden abrogation of vitally needed safeguards, without the substitution of a federal protection which could be adequate and effective until, after years of investigation and the issuance of innumerable orders, the Interstate Commerce Commission might provide relief. Clearly, the only doctrine compatible with the public safety would be an affirmation of the rulings hereafter quoted, to the effect that until the delegated power of the Federal Government is exercised in substitution for the existing state power, there should be no destructive annulment of the power of the state.

> "That has been the law since the beginning of railroad transportation. It was not intended that pending Federal action the use of such agencies, which unless carefully guarded was fraught with danger to the community, should go unregulated and that the state should be without authority to secure needed local protection."
>
> *Atl. Coast Line vs. Georgia,* 234 U. S. 280, 291.

In the Minnesota Rate Cases the authority of the state in the absence of actual conflict with federal authority, actually exercised was upheld:

> "Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of

its people, although interstate commerce may incidentally or indirectly be involved."

Minnesota Rate Cases, 230 U. S. 352, 402.

Since Congress had not legislated concerning intrastate rates the court held:

> "It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or **attempted to override the accustomed authority of the State without the provision of a substitute.** On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 620, 621."

Minnesota Rate Cases, supra, 421.

It is significant that this court cited the Larabee Mills case in support of the foregoing rule because that case was not one involving state legislation concerning rates, but **a conflict between state and federal authority over "car service"**—which is the very question brought forward by plaintiffs in the present case. Mr. Justice Brewer, delivering the opinion of the court, referred to "the oft repeated rule that the state, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens."

Thereupon the court laid down the rule which had long been in effect and which is maintained in many recent opinions of this court and which, although quoted under Point V, deserves repetition in the present connection:

"On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But **the fact that Congress has entrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission.** Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. **A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the State.** It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce and the delegation of that control to a commission necessarily withdraws from the state all power in respect to regulations of a local character. **This proposition can not be sustained.** Until specific action by Congress or the commission the control of the state over these incidental matters remains undisturbed."

Missouri Pacific Ry. vs. Larabee Mills, 211 U. S. 612, 623.

The foregoing case is cited with approval in *Morris v. Duby*, 274 U. S. 135, 143.

Returning now to the Minnesota Rate Cases, we quote further:

"If the authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a **dormant Federal power**, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province."

Minnesota Rate Cases, supra, page 417.

The foregoing doctrine is maintained in many subsequent cases including:

Great Northern R. Co. v. Merchants Elevator Company, 259 U. S. 285, 291.

Western & Atlantic R. Co. v. Georgia Pub. Serv. Com., 267 U. S. 493, 497.

Arkansas R. R. Com. v. C. R. I. & P. R. Co., 274 U. S. 597, 603.

Railroad Comrs. v. Great Northern R. Co., 281 U. S. 412.

Smith, et al. v. Ill. Bell Tel. Co., decided December 1, 1930.

Finally a more extended quotation may be warranted from a case previously cited which involved the same is-

sue, between **active** state police power and **dormant** federal power, which is raised in the present case:

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. **It was not intended that pending Federal action the use of such agencies, which unless carefully guarded was fraught with danger to the community, should go unregulated** and that the States should be without authority to secure needed local protection. The requirements of a State, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another State in the exercise of a similar power may not impose the same regulation. We may repeat what was said in *Smith v. Alabama,* 124 U. S. 465, 481, 482; 'It is to be remembered that railroads are not natural highways of trade and commerce * * *. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precaution. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise

endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.' See also, *Nashville &c Rwy. Co. v. Alabama,* 128 U. S. 96; *Hennington v. Georgia,* 163 U. S. 299; *N. Y. N. H. & H. R. R. Co. v. New York,* supra; *Lakeshore & M. S. Rwy. Co. v. Ohio,* 173 U. S. 285; *Missouri Pacific Rwy. Co. v. Larabee Mills,* 211 U. S. 612; *Missouri Pacific Rwy. Co. v. Kansas,* 216 U. S. 262; *Chicago R. I. & Pac. Rwy. Co. v. Arkansas,* 219 U. S. 453; *Minnesota Rate Cases,* 230 U. S. 352, 402, 410.

"If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. **That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its power to protect life and property within its borders,** but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

* * *

"It does not appear, however, either that Congress has acted **or that the Commission under the authority of Congress has established any regulation** so far as headlights are concerned. As to these, the situation has not been altered by any exertion of Federal power and the case stands as it has always stood without regulation unless it be supplied by local authority. The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. *Missouri Pacific v. Larabee Mills,* supra; *Savage vs. Jones,* 225 U. S. 501, 533."

Atlantic Coast Line v. Georgia, 234 U. S. 280, 291, 293.

CONCLUSION

Judicial Knowledge of Present Conditions

This court will of course "take judicial cognizance of all matters of general knowledge" (*Muller v. Oregon*, 208 U. S. 412, 420). Unembarassed either by the silence of the complainant or by allegations and conclusions which are contrary to common knowledge, the court will take notice of those obvious present conditions which show that there is even **greater** need for the Arkansas full crew laws today than there was when they were enacted.

Present Conditions

Today we observe freight trains with as many as one hundred cars or more, winding through the countryside and endangering and blocking myriads of highway crossings and the street crossings of busy cities. Not merely pleasure travel, but interstate and intrastate transportation by busses and trucks, and the urgent business of police and fire departments, ambulances and physicians' cars, are blocked by the operation of such trains with crews inadequate to prevent breakdowns and repair defects promptly, or to cut stalled trains at highway crossings. These are trains so long that the exchange of signals between the engine and the caboose (half a mile to a mile apart) is impossible without the aid of intermediate employees. The more cars there are in one train the more attention is required from the one train crew to watch for, and to give emergency attention to, hot boxes, defective brakes, knuckles that are broken, drawbars that are pulled out, or other dangerous conditions that are common incidents of freight train operation. When such trains must be cut in two in order not to block, illegally, highway crossings, employees must be

available to guard the crossings, or the public safety will be unduly imperilled.

Today we observe a constant stream of motor vehicles over every grade crossing of a well-paved highway whereas fifteen years ago there were comparatively few such roads; and vehicles were comparatively infrequent.

The need for **larger** crews to protect the safety of train operation and the safety of the public, travelling by train and travelling the state highways—**larger crews** than were needed fifteen or twenty years ago—is so obvious that the absence of any allegations in the bill of complaint to the effect that **smaller** crews are now needed is easily interpreted: The complainant did not wish to affront common sense by making any such insupportable allegations.

Summary of Appellees' Contentions

We submit that there is no precedent whatsoever for the institution, or maintenance, of this proceeding.

It is a suit against the State of Arkansas.

It is a suit to prevent State officials from enforcing laws which have been held valid by the highest courts of the State and the United States.

It is "a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which these officers will act only by formal judicial proceedings in the courts of the State."

It is a suit in equity to prevent the enforcement of a criminal statute, although the complainant has a plain, adequate and complete remedy at law.

It is a suit which burdens the Federal Courts and the State officials with the excessive cost and delay of an

equity proceeding, which interferes with the speedy and orderly trial of an issue at law in the State Courts and denies to the State Courts their rightful jurisdiction to enforce and to pass on the validity of State laws.

It is a suit to annul the exercise of the reserved police powers of the States in a field of legislation where no substitute Federal power has been exerted for the necessary protection of public safety.

It is a suit in contravention of the plain language and clearly defined purpose of the Eleventh Amendment, and is not within the jurisdiction of the Federal Courts.

It is a suit in contravention of the foundation principles of equity jurisdiction.

It is submitted that the bill of complaint exhibited an entire want of federal jurisdiction and an entire want of equity jurisdiction and that the bill was properly dismissed.

Respectfully submitted,

HAL L. NORWOOD,
Attorney General of the State of Arkansas,
DONALD R. RICHBERG,
Counsel for Appellees.

JOE JOINER,
Prosecuting Attorney,
Thirteenth Circuit,
CHESTER HOLLAND,
Prosecuting Attorney,
Twelfth Circuit,
W. D. JACKSON,
Of Counsel.

APPENDIX

Full Crew Laws of the Several States.

The laws of the various states regulating the number of employees required to operate trains are cited and briefly described in Bulletin No. 370 of United States Bureau of Labor Statistics, as shown in the following excerpt from that bulletin, pp. 83-84:

> "A number of States have laws regulating the minimum number of employees required for the operation of trains of different classes and numbers of cars, and some also for switching operations. The details vary somewhat, though there has been an effort at standardization. Instead of a statutory fixing of the numbers, some States provide for a determination by the railroad or similar commission of the State; and in a few recent instances laws fixing numbers have been repealed and the matter placed in the hands of the commission for action after investigation. Indiana repealed its existing laws in 1921 (chs. 81, 82) without enacting any substitute. A similar fate met the law of Missouri by referendum in 1914, the legislature also declaring its repeal in 1919 (p. 247).
>
> "The law of Oregon is fairly representative of the statutes on this subject. It is as follows:

OREGON—LAWS

Sufficient Crews for Trains

> "Section 5944. **Passenger, etc., trains.** It shall be unlawful for any person, corporation, company, or officer of court operating any steam railroad or railway in the State of Oregon and engaged as a common carrier in the transportation of freight

or passengers to operate over its road, or any part thereof, in excess of fifteen continuous miles, or suffer or permit to be run over the same, outside of yard limits, any passenger, mail or express train consisting of four or more cars with less than a full passenger crew consisting of five men, to-wit: One engineer, one fireman, one conductor, one brakeman, and one flagman (such flagman to have had at least six months' experience in train service) and none of said crew shall be required or permitted to perform the duties of train baggageman or express messenger while on such road.

"Section 5945. **Freight trains.** It shall be unlawful for any person, corporation, company, or officer of court operating any steam railroad or railway in the State of Oregon, and engaged as a common carrier in the transportation of freight or passengers to operate over its road or any part thereof in excess of fifteen continuous miles, or suffer or permit to be run over the same outside of yard limits, any freight train consisting of forty or more cars, exclusive of locomotive and caboose, with less than a full train crew, consisting of six men, to-wit: One engineer, one fireman, one conductor, two brakemen and one flagman (such flagman to have had at least six months' experience in train service): **Provided, however,** That all main line local freight trains shall have a full crew consisting of six men, to-wit: One engineer, one fireman, one conductor, two brakemen, and one flagman (such flagman to have had at least six months' experience in train service): **Provided further,** That light engines operated outside of yard limits will be provided with a full crew of three men, to-wit: One engineer, one fireman, and one pilot,

but this provision is not to apply to helper engines within helper districts.

"Section 5946, **Violations.** (Violations entail penalty of fine, $20 to $100 for each offense.)

"States having similar laws, i. e., fixing the numbers by statute, are:

Arizona—R. S., secs. 2171-2182.
Arkansas—Digest, secs. 8577-8586.
California—Acts of 1911, ch. 49 (am. 1913, ch. 168; 1915, ch. 501).
Maine—R. S., ch. 57, Sec. 60.
Mississippi—Acts of 1914, ch. 170.
Nebraska—C. S., secs. 5336-5341.
Nevada—R. L. 1919, p. 2976, secs. 1-7.
New York—Con. L., ch. 49, sec. 54a (added 1913, ch. 146; am. 1921, ch. 290).
North Dakota—Acts of 1919, ch. 169.
Ohio—G. C., secs. 12553-12557-3 (am. 1911, p. 508; 1913, p. 191; 1919, p. 687).
Oregon—Laws, secs. 5944, 5945.
South Carolina—Civ. C., sec. 3217.
Texas—R. Civ. S., secs. 6571-6575.
Washington—Acts of 1911, ch. 134.
Wisconsin—Statutes, secs. 192.41 - 192.44, 192.46.

"The power of regulating numbers is placed in the hands of a railroad, public service, or similar commission, in the following States:

Connecticut—G. S., sec. 3810.
Maryland—A. C., art. 23, sec. 435c, added 1922, ch. 143.

Massachusetts—G. L., ch. 160, sec. 185.

New Jersey—Acts of 1917, ch. 94 (am. 1922, ch. 270).

Pennsylvania—Acts of 1921, No. 184.

West Virginia—Code, sec. 639 (am. 1921, ch. 150).

(Note: **Mississippi** re-enacted and extended the Act of 1914 in Acts of 1930, Ch. 219. In the **Connecticut** Revision of 1930 it appears that commission regulation is now authorized under Sec. 3588. The **Maryland** law should now be cited as, A. C., Art. 23, Sec. 376.)

The foregoing summary of state laws (published May, 1925) may be supplemented by references to the varying provisions of the different laws above cited:

ARIZONA requires three brakemen on freight trains exceeding thirty-nine cars and on all local freights.

CALIFORNIA requires three brakemen for fifty cars, four brakemen for seventy-six cars, and an additional brakeman for every additional twenty-five cars; providing, also, for additional brakemen for the operation of long trains on heavy grades.

NEBRASKA requires three brakemen on local freights.

NEVADA requires three brakemen on freight trains exceeding fifty cars.

NEW YORK requires three brakemen on freight trains exceeding twenty-five cars.

NORTH DAKOTA requires three brakemen on freight trains of over forty cars.

OREGON requires three brakemen on freight trains exceeding thirty-nine cars; and on all main line local freights.

PENNSYLVANIA required three brakemen on freight trains exceeding thirty cars under the law of 1911. Since the amendment of 1921 vesting authority in the Public Service Commission, various requirements have been imposed, including such requirements as three brakemen.

WASHINGTON requires three brakemen on freight trains exceeding twenty-four cars.

In addition to the preceding ten states there are the following: Four states require not less than two brakemen. Two states have special requirements as to brakemen. Commission regulations in the other five states vary considerably.

In addition to the States heretofore listed, other States have empowered regulatory commissions to impose requirements which may be assumed to cover the number of employees required to operate trains. Such, for example, are the powers conferred on the Illinois Commerce Commission by Chapter 111-⅔, Secs. 49 and 61, Rev. Stat. of Ill. 1929, where broad powers are given the commission to regulate the methods, and to insure the safety, of train operations.

Among the decisions of State Supreme Courts upon these laws may be cited the following:

Pittsburgh, Cincinnatti, C. & St. L. Ry. Co. vs. Indiana, 172 Ind. 147, sustaining the validity of the Indiana law (which required three brakemen on a freight train exceeding fifty-eight cars).

Pennsylvania Railroad vs. Ewing, 241 Pa. 581, sustaining the validity of the Pennsylvania law requiring three brakemen on freight trains exceeding thirty cars.

State ex rel Spillman vs. Chicago St. P. M. & O. R. Co., 115 Neb. 306, in which the court held, concerning the Nebraska law requiring three brakemen on local freights, as follows:

"It is probable, though we do not decide, that the State may under the police power regulate the size of the train crews on all railroad trains, and that enactments of the legislature in that behalf are not violative of the Federal Constitution. It may be admitted, too, that the transportation act of 1920 does not concern train crews."

According to *Statistics of Railways in the United States*, 1929, p. XXVI, the states above listed specifically regulating train crews contained in the aggregate, 44.88 per cent of the railway mileage in the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,
v.
HAL NORWOOD, Attorney-General of the State of Arkansas; JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and CHESTER HOLLAND, Prosecuting Attorney for the Twelfth Circuit of Arkansas,
Appellees.
No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S MOTION FOR REHEARING.

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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APPELLANT'S MOTION FOR REHEARING.

To the Honorable, the Supreme Court of the United States:

The undersigned, with respect, desires to make the following suggestions, in the nature of a petition for rehearing herein, with a view to the correction of what we think are errors in the decision of the Court:

I.

In setting out the substance of the pertinent allegations of the petition, the Court inadvertently overlooked paragraph V of the petition, which was as follows:

"The Extra Switchmen and Extra Brakemen Provided by the Arkansas Laws Are Not Used in Standard Railroad Practice.

"Plaintiff respectfully presents to the Court that railroad operating conditions on the lines of the plaintiff railroad in the State of Arkansas and elsewhere, and on railroads throughout the United States generally, differ from conditions which existed in 1907 and 1913, when the Arkansas Full-Train-Crew and Full-Switching-Crew Laws were passed, in that additions and betterments have been made to road and equipment in the way of improving and making stronger and more secure the rails, roadbeds and bridges, reducing grades, procuring heavier, stronger and safer engines and cars, and safer power, **so that today freight trains and passenger trains containing many more cars than those which could be safely operated when said laws were enacted can now be operated in Arkansas and throughout the United States generally much more safely than smaller trains could then be operated.**

"Said additions and betterments, costing many millions of dollars, have been made by the plaintiff herein for the express purpose of enabling it to increase its operating efficiency, economy and safety in the run-

ning of longer and heavier freight and passenger trains.

* * * * * * *

"There is no reason, from the standpoint of safety or from any other standpoint, why said extra switchmen and extra brakemen should be employed upon switch engines and freight trains operated into and through the State of Arkansas."

II.

The Court also inadvertently overlooked the following portion of paragraph VI of the petition, to wit:

"Because of the law of Arkansas requiring an extra brakeman upon the plaintiff's freight trains, plaintiff is compelled to employ an extra brakeman in addition to the standard crew required in the operation of its through and local freight trains, and said extra brakeman, being wholly unnecessary in the operation of said trains, customarily leaves said train when the Arkansas state line is reached, and said extra brakeman then customarily deadheads back to the nearest division point on street car, bus or train, and the plaintiff is required to pay said extra brakeman for full time, although very little of said brakeman's time is employed in the actual operation of the plaintiff's trains."

III.

The Court, in its opinion, also overlooked the following allegation in paragraph VIII of the petition:

> "(c) Said statutes are also unreasonable and arbitrary; they bear no real or substantial relation to their ostensible purpose to add to the safety of switching or train operations, and they prevent plaintiff from using, operating and managing its engines and lines of railroad and its railroad facilities situated in the State of Arkansas in a reasonable and lawful manner, and prevent plaintiff from enjoying the benefits and advantages which would accrue to plaintiff from standard, safe and economical operations, all as hereinabove shown."

IV.

In view of the above allegations of fact, which the appellees' motion to dismiss admitted, the Court is in error in concluding that

> "There is no showing that the dangers against which these laws were intended to safeguard employes and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews."

V.

In view of the above-quoted provisions of the petition, it should be evident that the statement that

> "There is no showing that the dangers against which these laws were intended to safeguard employes and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described,"

is erroneous under the rule of law that

> "In testing the sufficiency of pleadings by general demurrer, every reasonable intendment should be indulged to support it."

And it is respectfully submitted that the conclusion of the Court in the opinion in this case is at variance with the established rule of practice prescribed by this Court in similar cases, which holds that it is error to sustain a motion to dismiss where all the facts, which the motion to dismiss admits, establish a prima facie case.

Georgia Power Co. v. City of Decatur, 281 U. S. 505;
Chicago Junction Case, 264 U. S. 262;
Great Northern R. R. Co. v. Minnesota, 238 U. S. 340;
State of Washington v. Fairchild, 224 U. S. 510;
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Banton v. Belt Line, 268 U. S. 413;
Lincoln Gas & Elec. Co. v. City of Lincoln, 250 U. S. 256.

VI.

The Court also overlooked the fact that Congress has defined the word "practice," in Section 1 of the Act to Regulate Commerce, as giving the Interstate Commerce Commission complete jurisdiction to regulate the safety and adequacy of "the supply of trains," and that, in interpreting its powers under this section, the Interstate Commerce Commission has held that:

> "We accordingly find that jurisdiction to regulate the supply of trains for the transportation of property has been vested in us."
>
> In re Train Service on Northern Pacific, 112 I. C. C. 191, decided April 28, 1926.

VII.

The Court also overlooked the fact that, in granting to the Interstate Commerce Commission, as an administrative body, the right to establish rules, regulations and practices, the Commission, by Paragraph 14, Section 1 of the Act to Regulate Commerce, is given the exclusive authority to

> "establish reasonable rules, regulations and practices with respect to car service by carriers by railroad subject to this act,"

and that, by paragraph 17 of section 1 of the act, the only power delegated to the states with reference to car service and "the supply of trains" is

> "to require just and reasonable freight and passenger service for intrastate business";

and that, by paragraph 21 of section 1 of the act the Interstate Commerce Commission is given complete jurisdiction

> "to authorize or require, by order, any carrier by railroad subject to this act, party to such proceeding, **to provide safe and adequate facilities for performing, as a common carrier, its car service, as that term is used in this act.**"

The Court also overlooked the fact that Congress has thus given the Interstate Commerce Commission complete jurisdiction to require common carriers to provide

> "safe and adequate facilities for performing, as a common carrier, its car service, as that term is used in this act."

And since paragraph 10 of section 1 of the act defines the term "car service" as including "the supply of trains," the Interstate Commerce Commission is thus given complete jurisdiction to require carriers to provide a "safe and adequate" supply of trains; that this amendment was first included in the act in 1920, and, having thus been delegated by Congress with complete jurisdiction to provide "safe and adequate" trains, the Arkansas law, which re-

quires trains to be manned with one more brakeman than is necessary for "safe and adequate" service, is clearly inconsistent with the power delegated to the Interstate Commerce Commission.

Wherefore, the appellant prays that the Court may grant it a rehearing, to the end that the above errors in the opinion rendered in this cause may be corrected upon a reargument and resubmission of the cause, for which appellant will ever pray.

Respectfully submitted,

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

We certify that the foregoing motion is well-founded and is not made for the purpose of delay.

T. B. Pryor

Edw. J. White

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IN THE

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Appellant,

vs.

HAL NORWOOD, Attorney-General of the State of Arkansas; JOE JOINER, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, and CHESTER HOLLAND, Prosecuting Attorney for the Twelfth Circuit of Arkansas,
Appellees.

No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S MOTION TO MODIFY MANDATE.

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Appellees.

No. 193.

Appeal from the District Court of the United States for the Western District of Arkansas.

APPELLANT'S MOTION TO MODIFY MANDATE.

To the Honorable, the Supreme Court of the United States:

The undersigned, with respect, desires to make the following suggestions, in the nature of a petition for modification of the mandate issued by the Court in the above-entitled cause:

I.

Appellant presents to the Court that its action is a suit in equity to enjoin the Attorney-General and the Prosecuting Attorneys of two circuits of the State of Arkansas from the enforcement of statutes of that state regulating freight-train crews and switching crews, upon the allegation that said statutes are repugnant to the Constitution and laws of the United States; that the three-judge court, wherein the appellant's application for a temporary injunction was heard, sustained the appellee's motion to dismiss said cause, and held that the complaint was insufficient to show any ground for relief in equity, and entered an order dismissing the case.

II.

That upon submission of said cause upon said petition and motion to dismiss and the briefs of appellant and appellees, this Court, in an opinion rendered April 13, 1931, affirmed the judgment and decision of the three-judge court holding appellant's petition was insufficient to show any ground for relief, and in the course of its opinion in this cause this Court found that

> "there is no showing that the dangers against which these laws were intended to safeguard employes and the public no longer exist or have been lessened by the improvements in road and equipment, or by the changes in operating conditions there described. And,

> for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. * * * While costs of complying with the state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due-process clause of the Fourteenth Amendment (Lehigh Valley R. R. Co. v. Commissioners, 278 U. S. 23, 34; Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 529), there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question."

And this Court, in its order, proceeded to affirm the decree of the three-judge court dismissing the appellant's bill, and in the mandate sent down by the clerk of this court to the three-judge court this Court ordered said Court to dismiss the appellant's bill without expressly affording the appellant an opportunity to file an amended bill, and set forth the facts which furnished the basis for this Court's opinion, that said statutes were not arbitrary and repugnant to the due-process clause of the Fourteenth Amendment.

III.

And appellant respectfully presents to the Court that said mandate should be modified by direction to said three-judge court to permit the appellant to amend its peti-

tion in the interest of justice, if said three-judge court should find that such amendment were necessary in order to properly present the fact that the employes of the appellant and the public are properly safeguarded under present operating conditions without the extra brakemen and extra switchmen provided for by said laws, and that, in truth and in fact, the improvements in road and equipment and the changes in operating conditions which have been adopted by the appellant since said laws were upheld by this Court rendered the employment of the third brakeman and third switchman no longer necessary for the safe operation of the appellant's trains and switch engines in the State of Arkansas, in order that the appellant may thus properly have the three-judge court consider the facts in determining its claim under the Constitution of the United States that such laws are arbitrary and repugnant to the due-process clause of the Fourteenth Amendment.

IV.

That in truth and in fact, under the amendments to the Federal Safety Appliance Act since said laws were enacted, on February 17, 1911, March 14, 1915, and June 7, 1924, it has been unlawful for any common carrier to use any locomotives which are not equipped with power brakes which can be operated from the engine, or any cars not equipped with air brakes and automatic couplers, and under and in pursuance of said Federal Safety Appliance

Act, as amended since said laws were enacted, the Interstate Commerce Commission, on June 6, 1910, entered an order requiring 85 per cent of all the cars used on all freight trains to be equipped with automatic couplers and air brakes, and since said date, on April 27, 1923, as a result of tests made by the Interstate Commerce Commission of different automatic and air-brake controlled devices, the said Interstate Commerce Commission, by its order entered July 18, 1924, provided that all power brakes used upon freight cars by the carriers engaged in interstate commerce in the United States should be provided with means whereby emergency brake application could be obtained immediately following a full service brake application, and said Commission ordered that all power brake systems must provide adequate means whereby an engineman could control the release of the brakes by graduated steps, and said Commission prescribed full specifications and requirements covering the maintenance and operation of power brakes and appliances intended to safeguard the employes in the operation of freight trains in the United States.

And appellant respectfully presents to the Court that it has fully complied with the orders of the Interstate Commerce Commission and the said Federal Safety Appliance Acts, as amended, since said laws were enacted by the State of Arkansas, and now all of the appellant's engines operated in said state are equipped with safety devices, so that the speed of freight trains and the starting and stop-

ping of the same upon the appellant's railroad is entirely under the control of the men operating its engines.

That the provisions of the Arkansas Law of 1907, requiring a third brakeman upon trains of twenty-five cars or more, were intended to require the same number of brakemen that were employed when hand-brakes were wholly used in the operation of freight trains and when link-and-pin couplers were in general use upon the freight trains operated upon the railroads in said state.

That with the improvements which have now been adopted by the appellant upon its engines and freight cars under and in pursuance of the Federal Safety Appliance Laws of the United States, as amended since said Arkansas statutes were enacted, and the orders and regulations of the Interstate Commerce Commission in pursuance thereto requiring air brakes regulated entirely from the engine and automatic couplers and other safety appliances, said hand-brakes and said link-and-pin couplers which were in use at the date when third brakemen were generally employed upon the railroads in said state have now been wholly superseded upon appellant's freight trains, and the employment of a third brakeman upon any of said trains is now wholly unnecessary, and the provisions of said law are obsolete and will perform no useful function, either as to safety or attaining any other useful object as applied to the operation of the appellant's freight trains or those of the other railroads operated into and through the State of Arkansas.

That the use of said safety appliances with which all of the appellant's engines and freight cars have been equipped since the enactment of said statutes requiring power brakes on all cars precludes, as a matter of safety, the use of hand-brakes and link-and-pin couplers in the operation of freight trains upon appellant's railroad in the State of Arkansas, and, under the conditions now existing in said state upon appellant's railroad, the control of the speed of freight trains and the starting and stopping of said trains upon appellant's railroad in said state are entirely under the control of the men operating engines that pull said trains, and the only office performed by the brakemen on said trains, with reference to stopping and starting of trains, is to give the proper signal to the enginemen, or, in cases of emergency, when for any reason the enginemen do not observe the signal, the train may be stopped by the conductor's valve located in the caboose. That the effective working of said air brakes is made apparent by an air-pressure gauge placed upon the wall of the caboose used in all of the appellant's freight trains in said State of Arkansas, immediately in front of the brakeman's seat in the cupola of said caboose, and said air-pressure gauge is clearly visible from the floor of said car.

That said law was enacted to provide for the employment of the same number of brakemen employed when freight cars were equipped with hand brakes and link-and-pin couplers, and before freight engines were equipped

with the safety appliances aforesaid and freight cars with the air brakes, which completely avoid the necessity for a third brakeman upon the appellant's freight trains in the State of Arkansas.

And appellant further respectfully presents to the Court that the said Arkansas Law of 1913 requiring a third helper on all switch engines where switching or transferring of cars is made across public crossings is the only law in the United States where such a provision maintains; that it is wholly unnecessary, and the object of said law was intended solely to provide for a third helper or switchman in the switching and transferring of cars in said state, although the safety and skillful operation of switch movements does not require the employment of said third helper or switchman.

That the standard rules of the American Railway Association, which are in use upon all of the railroads in the United States and which are rigidly enforced, provide as follows:

> "When cars are pushed by an engine, except when shifting or making up trains in yards, the trainman must take a conspicuous position on the leading car, and, when shifting over public crossings at grade not protected by a watchman or gates, a member of the crew must protect the crossing."

That this rule is strictly adhered to upon the appellant's railroad in the State of Arkansas, and said rule

fully protects the public in the use of crossings without the use of the third helper or switchman required by said law.

That the standard agreement in effect in all the states through which the appellant operates with its yardmen provides that:

> "A yard crew shall consist of not less than a foreman and two helpers."

That under said rules, and with the use of the improved appliances now used by the appellant in the operation of its freight cars and switch engines in the State of Arkansas, the necessity for said extra-switchmen law of 1913 has been wholly obviated, and said law does not in any manner minimize the injuries to persons in said state.

V.

And appellant respectfully presents that it is in the interest of justice and equity that the appellant be permitted to set up the aforesaid facts in an amended petition in this cause to the end that said cause may be finally determined by the three-judge court upon a full and fair consideration of the facts and present conditions which were not pleaded or fully set forth in appellant's petition adjudged insufficient by this Court.

That upon a consideration of said cause upon the facts and equities under an amended petition setting up the

facts and true conditions as they now exist, said statutes as applied to the operation of the appellant's railroad in the State of Arkansas should be adjudged unreasonable and arbitrary, and contrary to the Fourteenth Amendment to the Constitution of the United States, in that said statutes compel an expenditure annually of $600,000.00 per year by the appellant, without any corresponding benefit or advantage to the appellant, because said statutes are not necessary to conserve the interests or safety of appellant's employes or the public of the State of Arkansas.

VI.

And appellant further presents that it is consistent with the practice of the federal courts of equity to permit an amendment where material facts have not been alleged with sufficient precision in the bill even after a trial and final disposition of said cause; or where, for any reason, the bill was imperfect in substance or the rights of the parties were not determined upon the merits, this Court may award an amendment or repleader after judgment has been rendered, an appeal heard in this cause and the cause reversed and remanded by this Court.

Wells Fargo vs Taylor 254 U.S. 175

Garland v. Davis, 4 Howard 131, 11 L. Ed. 907;
Snyder v. Rosenbaum, 215 U. S. 261;
Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590.

VII.

And appellant respectfully presents to the Court that it is consistent with the practice established in this court to modify its mandate in the furtherance of justice in equity cases, in order to permit the filing of an amended petition fully presenting the facts and equities of the parties in order that a right claimed under the Constitution of the United States may be fully considered and disposed of upon the facts.

U. S. v. Reading, 228 U. S. 158;
Bank of Commerce v. Bank of Tennessee, 163 U. S. 416;
Smyth v. Ames, 171 U. S. 362.

And, to the end and that this cause may be finally considered and adjudicated upon the facts as they really exist, rather than upon the imperfect case made by the appellant's petition, appellant presents that the three-judge court before whom this cause is pending should be left free to allow an amendment of the petition consistent with the facts, as this Court in such cases has ruled that:

"We are generally inclined to refer applications of this kind to the court of three judges, who have heard the whole matter, have read the record and can pass on the issue without additional labor."

Cumberland Telephone Co. v. Public Service Commission, 260 U. S. 219;
Southern Ry. Co. v. Watts, 259 U. S. 576.

Wherefore, to the end that appellant may ultimately have its day in court upon a full presentation of the facts in this cause, appellant prays that the mandate of this Court may be modified so that the appellant, if advised, may file an amended petition in this cause and the three-judge court may hear and consider the same, for which appellant will ever pray.

Respectfully submitted,

THOMAS B. PRYOR and
EDWARD J. WHITE,
Solicitors for Complainant and Appellant.

We certify that the foregoing motion is well founded and is not made for the purpose of delay.

THOS. B. PRYOR and
EDW. J. WHITE.

I acknowledge receipt of a copy of this motion.

Hal L. Norwood,
Attorney-General, State of Arkansas.

5/16/31

SUPREME COURT OF THE UNITED STATES.

No. 193.—October Term, 1930.

Missouri Pacific Railroad Company, Appellant,
vs.
Hal Norwood, Attorney General of the State of Arkansas; Joe Joiner, Prosecuting Attorney for the Thirteenth Circuit of Arkansas, et al.

Appeal from the District Court of the United States for the Western District of Arkansas.

[April 13, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

The company sued the attorney general and the prosecuting attorneys of two circuits of Arkansas to enjoin the enforcement of statutes of that State regulating freight train crews and switching crews upon the claim that they are repugnant to the Constitution and laws of the United States. On the complaint and supporting affidavits the plaintiff applied for a temporary injunction. Defendants moved to dismiss. The court, consisting of a circuit judge and two district judges, held the complaint insufficient to show any ground for relief and dismissed the case. 42 F. (2d) 765.

The statutes so assailed are Laws, 1907, Act 116, and Laws, 1913, Act 67 (§§ 8577-8579 and 8583-8586, Crawford & Moses' Digest, 1921) which so far as here material are printed in the margin.[1]

[1]Arkansas Laws, 1907, Act 116, provides:

"Section 1. No railroad company . . . owning or operating any line or lines of railroad in this State, and engaged in the transportation of freight over its line or lines shall equip any of its said freight trains with a crew consisting of less than an engineer, a fireman, a conductor and three brakemen, . . .

"Section 2. This Act shall not apply to any railroad company . . . whose line or lines are less than fifty miles in length, nor to any railroad in this State, regardless of the length of the said lines, where said freight train so operated shall consist of less than twenty-five cars . . .

"Section 3. Any railroad company . . . violating any of the provisions of this Act shall be fined for each offense not less than one hundred

The earlier Act requires railroad carriers whose lines are not less than 50 miles in length to have not less than three brakemen in every crew of freight trains of 25 cars or more. The later Act requires not less than three helpers in switch crews in yards in cities of the first and second class operated by companies having lines of 100 miles or more.

The complaint asserts that each of these Acts violates the commerce clause of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment and is repugnant to the Interstate Commerce Act as amended in 1920[2] and to the Railway Labor Act.[3] But they have been held valid by this court as against the claim of repugnancy to these clauses of the Constitution. See *Chicago, R. I. & Pac. Ry. Co.* v. *Arkansas*, 219 U. S. 453, 459, 465, affirming 86 Ark. 412, as to the Act of 1907, and *St. Louis & Iron Mtn. Ry.* v. *Arkansas*, 240 U. S. 518, affirming 114 Ark. 486, as to the Act of 1913.

The first of these cases was decided in 1911. The court held that the Act of 1907 is not a regulation of interstate commerce and that upon its face it must be taken as having been enacted in aid of, and for the protection of those engaged in, such commerce. It said that Congress might have taken entire charge of the subject, but that it had not done so and had not enacted regulations in respect of the number of employees to whom might be committed the management of interstate trains and that until it does the statutes of the State, not in their nature arbitrary,

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dollars nor more than five hundred dollars, and each freight train so illegally run shall constitute a separate offense. . . ."

Arkansas Laws, 1913, Act 67, provides:

"Section 1. That no railroad company . . . owning or operating any yards or terminals in the cities within this State, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities shall operate their switch . . . crews with less than one engineer, a fireman, a foreman and three helpers.

"Section 3. The provisions of this Act shall only apply to cities of the first and second class and shall not apply to railroad companies or corporations operating railroads less than one hundred miles in length.

"Section 4. Any railroad company or corporation violating the provisions of this Act shall be fined for each separate offense not less than fifty dollars and each crew so illegally operated shall constitute a separate offense."

[2] U. S. C., Tit. 49.

[3] U. S. C., Tit. 45, §§ 151-163.

must control. The court found that, while under the evidence there was admittedly room for controversy as to whether the statute was necessary, it could not be said that it was so unreasonable as to justify the court in adjudging it an arbitrary exercise of power. And it held that, being applicable alike to all belonging to the same class, there was no basis for the contention that it denied the company equal protection of the laws. The principles governing that decision were followed in the later case, decided in 1916, which upheld the Act of 1913. Both Acts were sustained as valid exertions of police power for the promotion of safety of employees and others.

The plaintiff says that, since these decisions, Congress has occupied the field and has delegated to the Commission and Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with §§ 1 (10) and (21), 13, 15 and 15a thereof and with the spirit of the Railway Labor Act of 1926.

It maintains that the allegations of the complaint together with the facts set forth in the affidavits show that, when applied to operating conditions on its lines in Arkansas, these state laws are arbitrary and violative of the Federal Constitution and laws. But the affidavits filed in support of the application for a temporary injunction may not be considered in determining whether the complaint states facts sufficient to constitute ground for relief. *Leo* v. *Union Pac. Ry. Co.*, 17 Fed. 273. *United States* v. *Marine Engineers' Ben. Ass'n No. 38*, 277 Fed. 830, 834. *McGregor* v. *Great Northern R. Co.*, 42 N. D. 269, 280.

The substance of the pertinent allegations of the complaint follows:

Present railroad operating conditions on plaintiff's railroad in Arkansas and elsewhere, and on railroads generally in this country, differ from those that existed in 1907 and 1913 when these laws were passed. Roads and equipment have been so improved that longer and heavier trains may be operated more safely now than much smaller trains could then be operated. It is standard practice of railroads "wherever the density of traffic is sufficient, except in the State of Arkansas, to operate freight and passenger trains and switch engines with crews consisting of less than the

extra switchmen [meaning one less than required by the 1913 Act] and extra brakemen [meaning one less than required by the 1907 Act] provided by the Arkansas laws."

Freight trains and switch engines are safely operated on lines similar to those of plaintiff "wherever the traffic and circumstances make such operation advisable, without such extra switchmen and extra brakemen". By increasing lengths of their freight trains, the plaintiff and other railroads in States "where such extra brakemen and extra switchmen are not [by law] required" have been able to effect great economies. But by the Arkansas laws plaintiff is compelled there to employ more than the standard crew and to pay for services and time not needed or used for the operation of its freight trains.

The standard agreement between plaintiff and the Brotherhood of Railroad Trainmen provides for a switch crew consisting of a foreman and two helpers and "also provides for a . . . freight train crew, in through and irregular freight service, of a conductor and two brakemen". Other railroads have similar agreements with the Brotherhood "with the exception of the service in States with laws similar to the above laws of the State of Arkansas".

And it is alleged that, if plaintiff were permitted to operate its freight trains without the extra brakemen required by the Act of 1907, its expenses would be reduced by $350,000 per year; and, if permitted to operate its switch engines without the extra helper required by the Act of 1913, its expenses would be reduced $250,000 per year.

The complaint contains much by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 536. *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500. The state laws are presumed valid. Moreover, in the cases here decided they were held not repugnant to the commerce clause of the Constitution or the due process or equal protection clause of the Fourteenth Amendment. The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity. *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447, and cases there cited. *N. O. Public Service* v. *New*

Orleans, 281 U. S. 682, 686. *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 88.

There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 Act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton. While cost of complying with state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due process clause of the Fourteenth Amendment, (*Lehigh Valley R. R.* v. *Commissioners*, 278 U. S. 24, 34. *Oregon R. R. & N. Co.* v. *Fairchild*, 224 U. S. 510, 529), there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question. And the claim that "standard" crews are generally employed by the railroads of the United States is substantially impaired by the qualified form of the allegations and also by the fact, which we judicially notice, that other States have laws somewhat similar to the Arkansas Act in question.[4] It is clear that, so far as constitutionality is concerned, the

[4] Arizona Revised Code (1928) §§ 649-651. [Laws 1912, c. 16.]

California Laws 1915, c. 501, amending c. 49, 1911, as amended 1913, c. 168.

Maine Revised Statutes (1930), c. 64, § 60. [Laws 1842, c. 9, § 3.]

Mississippi Laws 1930, c. 219, amending c. 170, 1914.

Nebraska Compiled Statutes (1929) c. 74, §§ 519-524. [Laws 1909, p. 405, 1913, p. 157.]

Nevada Revised Laws (1919), §§ 3588-3596. [Stats. 1913, p. 62, repealing Act of March 8, 1909, and Act of February 21, 1911, as amended March 28, 1911.]

New York Consolidated Laws, c. 50, § 54a. [Laws 1913, c. 146, as amended by Laws 1921, c. 290.]

facts alleged are not sufficient to distinguish this case from those in which this court has sustained these laws.

Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?

In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews. *Reid* v. *Colorado*, 187 U. S. 137, 148. *Savage* v. *Jones*, 225 U. S. 501, 533. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act in terms purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the "practice" of carriers in respect of the "supply of trains" to be provided by any carrier. But, assuming that the Act does so authorize regulation in respect of such practice and supply, it is clear that the delegation of power would not include the regulation of the number of brakemen or helpers. The Act uses the word "practice" in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers, but these matters differ widely in kind from the subject covered by the Arkansas laws. That word is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it. *B. & O. R. R.* v. *United States*, 277 U. S. 291, 300. The Act does not use that word in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in such crews. And it is also clear that there is nothing in the phrase "supply of trains" or in the purpose of the Act to suggest

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North Dakota Civil Code, §§ 4667a1-4. [Laws 1919, c. 169.]
Ohio Throckmorton's Annotated Code (1930), §§ 12553-12557 (3).
Oregon Code (1930), Tit. 62, §§ 1401-1403. [Laws 1913, c. 162.]
Texas Revised Civil Statutes (1925), Art. 6280. [Acts 1909, p. 179.]
Washington Pierce's Code (1929), §§ 5674-5678. [Laws 1911, p. 650.]
Wisconsin Statutes (1929), §§ 192.25 [1907, c. 402] and 192.26 [1913, c. 62].
§§ 1 (3) (10) (11) (12) (13) (14) (21), 13, 15, 15a.

that by it Congress intended to supersede state laws like those under consideration. The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is no similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END OF CASE